IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

MAY 5 1975

MICHAEL RODAK, JR., CLERK

No. 74-1388

ERLE E. PEACOCK, JR.,

Petitioner,

v.

BOARD OF REGENTS OF THE UNIVERSITIES AND STATE COLLEGES OF ARIZONA; JACK R. WILLIAMS, WELDON P. SHOFSTALL; PAUL L. SINGER, SIDNEY S. WOODS, GORDON D. PARIS, JAMES E. DUNSEATH, MARGARET M. CHRISTY, KENNETH G. BENTSON, RALPH M. BILBY and RUDY E. CAMPBELL, each of the foregoing individually and in his or her capacity as a member of the Board Of Regents Of The Universities And State College Of Arizona; JOHN LENTZ and NORMAN SHARBER, each individually; JOHN P. SCHAEFER, individually and in his capacity as President of the University of Arizona; MERLIN K. DU VAL, individually and in his capacity as Vice President for Health Sciences and Acting Dean of the College of Medicine, University of Arizona; and DOUGLAS H. LINDSEY, individually and in his capacity as Acting Head of the Department of Surgery, College of Medicine, University of Arizona,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner Erle E. Peacock, Jr. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 4, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals, which has not been reported, appears in Appendix B hereto. The opinion rendered by the District Court for the District of Arizona and the Findings of Fact and Conclusions of Law, made by the Honorable Howard B. Turrentine, United States District Court Judge, which will not be reported, appear in Appendix A hereto. Petitioner did not petition the Court of Appeals for a rehearing or suggest a rehearing *en banc*.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on Februray 4, 1975 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 *U.S.C.* § 1254(1).

QUESTIONS PRESENTED

1. Whether, under the *First* and *Fourteenth Amendments*, the Head of a Department of Surgery in a state university, "who serves as the chief representative of his department faculty within [the] institution," may be suspended by the University President, without prior notice or hearing, based solely on philosophical differences of

opinion about the quality and nature of the medical education to be offered at the medical school?

2. Whether a person with an interest in continued employment or a particular status protected by the *Fourteenth Amendment* can be deprived of that protected interest by suspension therefrom without prior notice or hearing of any kind?

3. Whether the suspension of a Head of a Department of Surgery in a state university's only medical school which suspension the Circuit Court stated adversely reflected on him, which it stated resulted in a suggestion of incompetence, and which the District Court stated resulted in no further offers of employment as a Head of a Department of Surgery implicated or violated a liberty interest under either of the tests set forth in *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972): (1) whether the termination is based on charges which "might seriously damage . . . [the employee's] standing and associations in his community" or (2) whether the state, in terminating the employment, "imposes on . . . [the employee] a stigma or other disability that foreclose[s] his freedom to take advantage of other employment opportunities."

4. Whether, assuming arguendo that a person with a protected interest under the *Fourteenth Amendment* can be deprived thereof without prior notice or hearing, the post suspension hearings ordered herein contain the minimum elements of procedural due process when, as here, the state official who suspended such person selects one of two members of the tribunal which member then joins with the second to select a third, when such official has testified herein that he is not bound by the recommendation of such tribunal and in fact will not follow it if a recommendation is made to reinstate Petitioner as Head, and when the tribunal's proceedings do not provide for specific charges, notice in advance of the hearing of the

nature of the testimony of witnesses against him, cross-examination of witnesses, or an open hearing?

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment:

"Congress shall make no law . . . abridging the freedom of speech. . ."

Fourteenth Amendment, Section One:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

Petitioner, a graduate of the Harvard Medical School, is one of the foremost academic surgeons in the world, is the author of one hundred and forty-four scholarly medical papers and a leading text on wound repair, is the only researcher licensed by the F.D.A. to administer to human beings an experimental drug developed by him to eliminate the formation of scar tissue which is a primary cause of death, sits on the governing board for the certification of medical specialties in American medicine, is the receipient of national medals for excellence in surgery, is listed in *Who's Who in America*, and holds substantial federal grants for research.

In 1969, Petitioner, who was then on the faculty at the College of Medicine, University of North Carolina at Chapel Hill, was asked by University of Arizona administrators if he would come to its newly formed College of Medicine to organize

and develop the Department of Surgery as its Head, a seven to ten year job. Between 1969 and October 25, 1973, the date when Petitioner was dismissed as Head without any notice or hearing, Petitioner organized the Department of Surgery, recruited an outstanding faculty of twenty-five members, and had begun the development of a Department of Surgery which University of Arizona officials, including its President, conceded was one of the best departments in the University of Arizona and probably the best department in the College of Medicine.

On May 27, 1973, Petitioner received and accepted a written contract from the University of Arizona "for the fiscal year 1973-1974 effective July 1, 1973" as Professor *and* Department Head in the Department of Surgery in said university. The fiscal year was the period July 1, 1973 to June 30, 1974. Thereafter, in August of 1973, Petitioner was unanimously elected Head of the Department of Surgery by the department faculty.

However, on October 25, 1973, during the term of the foregoing contract or contracts and after his election as Head by the department faculty, Petitioner was dismissed as Head without notice and hearing. From October 25, 1973 to February 11, 1974, the Department of Surgery faculty sought action by the University administration to reinstate Petitioner as Head until he was afforded a due process hearing. On February 11, 1974, the University of Arizona administrators responded by suspending Petitioner from his tenured professorship, again without any notice or hearing.

This action, which sought Petitioner's reinstatement as Head and as Professor until a due process hearing had been accorded him with respect to each position, was commenced on February 22, 1974.

Hearings were held on a motion for

preliminary injunction seeking reinstatement as Head and as Professor during March of 1974. At those hearings and in lengthy memoranda, Petitioner contended that he had been denied his *Fourteenth Amendment* rights to procedural due process hearings when he was first dismissed as Head and later suspended as a tenured professor without notice and prior hearings since both his property interests and his liberty interests were implicated in both the dismissal as Head and suspension as Professor.

Petitioner contended that his property interests were involved in the October 25, 1973 dismissal as Head because he had three separate and distinct legitimate claims of entitlement to his position as Head. They were: (1) the written contract of employment as Head for the period July 1, 1973 to June 30, 1974; (2) the common law of the campus at the University of Arizona accorded to department faculties the right to select their own Head; and (3) his employment in 1969 to do a 7-10 year job of organizing and developing the Department of Surgery. Petitioner's claim that his liberty interests were implicated in the dismissal as Head was grounded on the propositions that: (1) a termination during the term of a contract imposed a stigma or other disability which foreclosed his opportunity to take advantage of other employment opportunities as Head of a Department of Surgery; (2) his dismissal was in punishment for his exercise of free speech at department head meetings where he expressed the views of his department faculty; (3) his dismissal as Head was based on charges which seriously damaged his standing and associations in his community; and (4) his dismissal as Head contravened the principles of academic freedom since it was based on "philosophical differences."

Petitioner's contention that his property interest was involved in the subsequent suspension as a tenured professor was based on two legitimate

claims of entitlement to said position: (1) he was a tenured professor; and (2) the written contract of employment as Professor for the period July 1, 1973 to June 30, 1974. His claim that his liberty interests were implicated in the suspension as Professor were based on arguments that: (1) the suspension was punishment for expression of views protected by the *First Amendment*; (2) the suspension during a term of contract imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities as a professor; and (3) the suspension seriously damaged his standing and associations in his community.

On May 7, 1974, the District Court entered an order reinstating Petitioner as Head of the Department of Surgery, but further provided, without citation of any authority, that the University had the "option" of immediately suspending him from his position as Head without notice and a hearing. The University of Arizona administrators then suspended Petitioner on May 7, 1974, within two hours after receipt of the opinion, without notice or hearing. The District Court also ruled that Petitioner was not entitled to either a pre-suspension hearing or a post-suspension hearing insofar as his tenured professorship was concerned, and therefore refused to reinstate him to such professorship.

The appeal to the Court of Appeals was filed on June 3, 1974.

While the appeal was pending, University of Arizona administrators, in response to faculty action and urging by the American Association of University Professors, reinstated Petitioner to his tenured professorship. The latter action rendered moot the appeal concerning the refusal of the District Court to reinstate Petitioner to his tenured professorship, and the Court of Appeals therefore ruled only on the issue of Petitioner's right to notice

and a due process hearing prior to his May 7, 1974 suspension as Head as authorized by the District Court.

The Circuit Court held that: (1) Petitioner had a protected property interest in his employment as Head; (2) the University of Arizona violated due process in dismissing him as Head on October 25, 1974 without notice and hearing; but that (3) even absent exceptional circumstances, none of which exist here, due process does not require notice or a hearing before Petitioner's suspension as Head on May 7, 1974 if there exists a "*potential threat* to the administration of a . . . school and the incidental *threat* of disruption of the functioning of the University Hospital." The Circuit Court thus held that in determining whether a person is entitled to a due process hearing before his property is taken, his interests in receiving the hearing provided for in the *Fourteenth Amendment* must be balanced against the state's interests in denying him such a hearing.

In addition, the Circuit Court also held that Petitioner's liberty interests were not implicated in his suspension as Head.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES IN *PERRY V. SINDERMANN*, 408 U.S. 593, 597-598 (1972); *KEYISHIAN V. BOARD OF REGENTS*, 385 U.S. 589, 605 (1967); AND *SHELTON V. TUCKER*, 364 U.S. 479, 485-486 (1960), HOLDING THAT AN EDUCATOR'S LIBERTY INTEREST IS DENIED WHEN, AS HERE, THE DECISION TO SUSPEND HIM FROM HIS EMPLOYMENT AS HEAD OF THE DEPARTMENT OF SURGERY INFRINGES UPON OR DETERS OR PUNISHES THE EXERCISE OF FREE SPEECH.

A violation of due process occurs if a suspension of a university educator is based on his exercise of free speech. *Pickering* v. *Board of Education*, 391 U.S. 563 (1968); *Sherbert* v. *Verner*, 374 U.S. 363 (1963); *Shelton* v. *Tucker*, 364 U.S. 479, 485-486 (1960); *Slochower* v. *Board of Education*, 350 U.S. 551 (1956); *Wieman* v. *Updegraff*, 344 U.S. 183 (1952). This civil liberty or collateral right is ensured by due process as a liberty within the *Fourteenth* and *First Amendments*. *Shelton* v. *Tucker*, *supra*; *Pred* v. *Board of Public Instruction of Dade County, Fla.*, 415 F.2d 851, 856 (5th Cir. 1969). The free exercise of this civil liberty is guaranteed by the *Bill of Rights* through incorporation in the *Fourteenth Amendment* against infringement by a state. *Keyishian* v. *Board of Regents*, 385 U.S. 589, 605 (1967); *Sherbert* v. *Verner*, 374 U.S. 398, 404-406 (1963); *Speiser* v. *Randall*, 357 U.S. 513, 518, 526 (1958). Therefore, any decision of a state to suspend a

university educator which infringes upon or deters or punishes the exercise of free speech is a deprivation of the liberty interest of the amendments. *Keyishian, supra; Sherbert, supra; Speiser, supra.* The protections of due process attach once such a liberty has been implicated. *Speiser, supra* at 513, 520-521, 524. Hence, even though an educator may lack a protected property interest in continued employment due to absence of tenure or a contract, he may not be terminated if the reason therefor was predicated on his exercise of his free speech *First* and *Fourteenth Amendment* rights. *Perry v. Sindermann*, 408 U.S. 593, 597-598 (1972); *Keyishian v. Board of Regents, supra; Shelton v. Tucker, supra.*

The Statement on Government of Colleges and Universities of the American Association of University Professors states that the chairman or head of a department "serves as the chief representative of his department within an institution," and should be selected by departmental election or appointed in conformity with department members' judgment. That the University of Arizona adheres to this principle is shown by the following testimony of its President:

> "Q. Well, let us talk about practice, then.
>
> Is it not correct that the Department of Geosciences, Physics, Journalism, Government, and Chemistry normally recommend, by whatever means they use, a person to be head of the department, and in practice you have appointed the person they recommended?
>
> A. This almost always happens, that is correct.

Q. That is correct in practice?

A. In practice, this is true throughout our 98 departments in the University.

Q. The common law of the campus, is that correct?

A. Yes."

Hence, the Head of a Department at the University of Arizona speaks for his department faculty, and is not a mere echo of either the Board of Regents or the University's administrative bureaucracy of president, vice presidents, assistant vice presidents, deans, assistant deans, controllers, registrars, and public relations men. Rather he fulfills, as the A.A.U.P. principles also state, his "special obligation to build a department strong in scholarship and teaching capacity" by presenting and advocating within the University of Arizona the views of the department faculty respecting educational philosophy and the consequences of such philosophy to issues of budget, space, faculty hiring and promotion, student training, and research allocations. Therefore, to the extent that the suspension of a department head at the University of Arizona is based on the exercise of free speech, both he and the department faculty, as well as academic freedom, have been seriously damaged.

That Petitioner's free speech was in fact implicated is shown by the University President's letter to Petitioner shortly before Petitioner's dismissal as Head without notice or hearing which letter stated that despite said President's conclusion that the Department of Surgery "has developed into a very strong unit that is attracting national attention," that Petitioner had "done an effective job of developing the Department;" and that "you should

take a considerable measure of pride in this accomplishment,"

> "I do have serious doubts about your ability to continue to administer the Department effectively because of the serious *philosophical* differences that have developed between you and the College administration." (Emphasis supplied). (See Appendix C for entire letter).

Since the only persons who stand beyond a Department Head in the College of Medicine are the Dean and Assistant Deans, it is clear that Petitioner, the chief representative of the department faculty within the University of Arizona, was dismissed and suspended without notice and hearing because his and the department faculty's views on educational philosophy differed from those of the Dean, an administrative functionary. That Petitioner spoke eloquently and effectively for the Department of Surgery faculty is shown by such faculty's unanimous support of Petitioner before and after the unlawful dismissal and their election of him as Head before and after the said dismissal.

More importantly, the Ninth Circuit has in substance held that it was only Petitioner's speech which was the basis of his suspension. The opinion states that the University "sought to remove him *solely* because of his lack of cooperation stemming from *differences of opinion* about how to run a medical school," but that "we do not intimate that appellant in fact refused to perform tasks assigned by the administration or that his lack of cooperation ever damaged either the medical school or the Hospital." That is, Petitioner's "lack of cooperation" was verbal.

A clearer case of speech constituting the

basis of suspension of a university educator is difficult to imagine. It is an especially offensive violation of the *First Amendment* when that educator is the chief representative within the university of the department faculty's views on educational philosophy. "No more direct assault on academic freedom can be imagined than for the school authorities to be allowed to discharge a teacher because of his or her philosophical, political, or idealogical beliefs." *Board of Regents* v. *Roth*, 408 U.S. 564, 581 (1972) (dissenting opinion of Justice Douglas). "Political power must abstain from intrusion into this activity of freedom [progress in the natural sciences] . . . ." *Sweezy* v. *New Hampshire*, 354 U.S. 234, 262 (1957) (Mr. Justice Frankfurter concurring in result). *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1966), stated:

> "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."

Consequently, the Ninth Circuit's decision that the suspension of Petitioner from his state employment as Head of the Department of Surgery did not impair his liberty interests conflicts with the foregoing decisions of this court.

2. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES IN *GOSS V. LOPEZ*, 43 U.S.L.W. 4181 (Jan. 22, 1975); *ARNETT V. KENNEDY*, 416 U.S. 134 (1974); *BOARD OF REGENTS V. ROTH*, 408 U.S. 564 (1972); *PERRY V. SINDERMANN*, 408 U.S. 593 (1972); AND *FUENTES V. SHEVIN*, 407 U.S. 67 (1972), SETTING FORTH THE PROCEDURAL DUE PROCESS REQUIREMENTS A STATE MUST AFFORD A CITIZEN PURSUANT TO THE *FOURTEENTH AMENDMENT* BEFORE SUSPENDING A PROTECTED PROPERTY INTEREST.

The Ninth Circuit ruled that a person having a protected interest entitled to due process procedural safeguards can be deprived of that interest without a prior hearing. It arrived at that conclusion as follows:

On May 7, 1974 the District Court entered its decision on Petitioner's Motion for a Preliminary Injunction in which Petitioner asked that he be reinstated as Head of the Department of Surgery at the University of Arizona College of Medicine because he had not been afforded a pre-termination hearing prior to his dismissal as Head on October 25, 1973. The District Court ruled:

(1) That Petitioner had a property interest in his position as Head protected by the *Fourteenth Amendment;*[1]

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1 Appendix A, pages A-9 to A-10.

(2) That said property interest was created by a contract issued by the University and signed by Petitioner; [2]

(3) That said contract was for the term July 1, 1973 to June 30, 1974 and had a balance of approximately eight and one-half months remaining when Petitioner was dismissed; [3]

(4) That the Due Process Clause of the *Fourteenth Amendment* requires that a person having a protected property interest be afforded a due process hearing before such interest is terminated unless special emergency conditions make such a hearing hazardous; [4]

(5) That Petitioner did not receive any such hearing; [5] and

(6) That no such emergency conditions existed on October 25, 1973 warranting Petitioner's dismissal without a prior hearing. [6]

Consequently, the District Court ordered reinstatement of Petitioner to his position as Head of the Department of Surgery but simultaneously granted Respondents the "option" of summarily suspending Petitoner from his duties pending a termination hearing to be held pursuant to University of Arizona procedures relating to the dismissal of tenured faculty members. [7] The Ninth Circuit affirmed.

In ordering the reinstatement of Petitioner to

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2 Appendix A, pages A-9 to A-10.
3 Appendix A, page A-9.
4 Appendix A, page A-10.
5 Appendix A, page A-4.
6 Appendix A, page A-10.
7 Appendix A, page A-11.

his employment or status as Head, the District Court correctly applied this Court's decisions. It first found that Petitioner had a protected property interest in his continued employment as Head of the Department of Surgery at the time of his dismissal and that therefore, pursuant to the *Fourteenth Amendment*, he could not be deprived of such interest without a pre-deprivation hearing. *Goss* v. *Lopez*, 43 U.S.L.W. 4181 (Jan 22, 1975); *Arnett* v. *Kennedy*, 416 U.S. 134 (1974); *Board of Regents* v. *Roth*, 408 U.S. 564 (1972); *Perry* v. *Sindermann*, 408 U.S. 593 (1972); *Connell* v. *Higginbotham*, 403 U.S. 207 (1971); *Bell* v. *Burson*, 402 U.S. 535 (1971); *Boddie* v. *Connecticut*, 401 U.S. 371 (1971); *Slochower* v. *Board of Education*, 350 U.S. 551 (1956); *Weiman* v. *Updegraff*, 344 U.S. 183 (1952). Then the District Court concluded that Petitioner could not be dismissed without a pre-dismissal hearing.[8]

However, when the District Court authorized the University administration to summarily suspend Petitioner as Head with pay after first ordering his reinstatement on May 7, 1974, it erroneously sanctioned a violation of Petitioner's right to a due process hearing prior to his suspension. A suspension is the equivalent of a termination under the Supreme Court's interpretation of the *Fourteenth Amendment*. In *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), the Court stated at pages 84-86:

> "But it is now well settled that a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in terms of the Fourteenth Amendment.
>
> . . . The Fourteenth Amendment draws no bright lines

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8 Appendix A, page A-10.

> around three day, 10-day or 50-day deprivations of property."

Thus, any suspension of Petitioner, even with pay, absent extraordinary or emergency circumstances, must be carried out under the same procedures required by the *Fourteenth Amendment* for a termination of Petitioner. *Lafferty v. Carter*, 310 F. Supp. 465 (W.D. Wis. 1970). Hence, when the District Court concluded termination could not lawfully be accomplished without a due process pre-termination hearing but that no due process hearing was required prior to suspension, such conclusion directly conflicts with the holdings of *Goss v. Lopez, supra; Arnett v. Kennedy, supra; Board of Regents v. Roth, supra; Perry v. Sindermann, supra; Fuentes v. Shevin, supra.*

Therefore, the question confronted by the Ninth Circuit was simple: does the *Fourteenth Amendment* require any notice or pre-deprivation hearing before a citizen's protected property interest is suspended or terminated?

The Ninth Circuit, in affirming the District Court's ruling that no such hearing is required, stated that prior to 1974 a pre-suspension hearing would have been required absent a showing that special circumstances existed warranting summary dismissal or suspension, none of which existed here.[9] The basis of the Ninth Circuit's ruling was

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9 Appendix B, page A-20. The District Court also found no special circumstances existed on May 3, 1974 because at the time it reinstated Petitioner it granted the University of Arizona the *option* of suspending him, an option the court could not be certain would be exercised. If dangerous or hazardous circumstances required the denial of a pre-suspension hearing, the court would *never* have given

its statement that in 1974 the Supreme Court decided two cases which changed the law.[10] The Ninth Circuit held that *Arnett v. Kennedy, supra,* and *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974), required a court to balance the interests of the state and the interests of the individual in determining *whether* prior notice or a pre-suspension hearing is required by the *Fourteenth Amendment* when a protected property interest is to be affected. The Circuit Court concluded that the District Court, after such balancing, had properly permitted summary suspension because the University's interest in obviating a "potential threat"[11]

Respondents the opportunity of returning Petitioner to his duties.

10 "Appellant contends that absent exceptional circumstances (none of which here exists) the outcome of that traditional due process balancing test is presumptively weighted in favor of a prior hearing. He cites several cases to support his position - *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972); *Bell v. Burson*, 402 U.S. 535, 542 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 259-260, 264 (1970); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 339, 342 (1969) - which, particularly *Fuentes*, indeed support his contention. *See also Board of Regents v. Roth, supra,* at 570 n. 7. Before the Court's decisions last term in *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974), and *Arnett v. Kennedy*, 416 U.S. 134 (1974), we might have agreed. *See Geneva Towers, supra* at 14; *Stewart v. Pearce*, 484 F.2d 1031 (9th Cir. 1973)." Appendix B, page A-21.

11 The Ninth Circuit further limited the phrase "potential threat" by stating in explanation thereof: "We do not intimate that appellant in fact refused to perform tasks assigned by the administration or that his lack of cooperation ever damaged

to the administration of a medical school was sufficient to outweigh Petitioner's interest in a hearing *before* he was deprived of his protected interest. That is, a state can deny a person having a protected interest a hearing before depriving him of that interest if it can think of a "potential threat" to the administration of a university. However, the test applied by the Ninth Circuit is based on an erroneous reading of *Arnett, supra,* and *Mitchell, supra.*

In *Mitchell, supra,* the Court upheld a Louisiana statute which permits a creditor to obtain an ex parte sequestration order to sequester personal property upon which payment is allegedly overdue by presenting a verified petition to a judge. The creditor is also required to post a bond to indemnify a debtor for all injury caused by a wrongful sequestration, including attorney's fees. The debtor can dissolve the order within a few days by application to the court. The majority opinion stated at pages 604, 616 and 618-169, that its decision was based upon the following considerations: (1) the area of debtor-creditor relations is *unique* because of the duality of interests in the affected property and the importance of maintaining commercial credit; (2) the entire procedure was *judicially supervised;* and (3) *quick relief* and full *payment* for injuries were guaranteed the wrongfully affected debtor. The instant case bears no factual resemblance to the *Mitchell* case, *supra.* Commercial credit, the unique debtor-creditor relationship and court supervision are totally absent herein, as is any opportunity for quick relief and full payment for injuries. *Mitchell* is not in point.

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either the medical school or the Hospital - the University's interest in obviating a potential threat is here sufficient to justify the suspension pending a hearing." Appendix B, page A-26.

Arnett does not support the Circuit Court's ruling. Rather, it directly supports Petitioner's right to a pre-suspension hearing. The *Arnett* case involved an attack on the constitutionality of statutory dismissal procedures under the *Lloyd-LaFollette Act*, 5 *U.S.C.* § 7501 (1970). The statute was upheld even though a full evidentiary hearing was not provided to employees until after termination. The Ninth Circuit held herein that the case stood for the proposition that a government employee with a protected property interest in continued employment could be summarily suspended or terminated if an evidentiary hearing were provided after the termination or suspension. What the Court failed to note, however, was that three of the six justices who voted to uphold the Act specifically approved of it only because certain pre-termination safeguards were provided,[12] namely, 30 days notice with a full list of specific charges and the opportunity for the employee to present affidavits and a personal appeal to the superior officer authorizing the dismissal. The Court held in *Arnett* that *some* type of prior notice and hearing were required by the *Fourteenth Amendment* before a protected interest could be affected and the Court found that the employee received them there. In the instant case, no hearing whatsoever was afforded Petitioner prior to suspension, nor did he receive a list of specific charges or an opportunity to rebut them.

Arnett and *Mitchell* require that a court, when deciding what is required by the *Fourteenth Amendment before* a protected interest can be terminated or suspended, must balance the interests of the state against the interest of the individual.

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12 Justices White, Powell and Blackmun; White, 416 U.S. at 195-196; Powell and Blackmun, 416 U.S. at 170.

However, *such balancing determines the type of notice and hearing required by the Constitution and not whether a prior hearing is to be held at all.* In *Arnett, supra,* three Justices ruled a full evidentiary hearing had to be afforded a person prior to termination or suspension and three Justices held such a hearing could be held after termination or suspension *if* some notice and hearing were afforded *prior* thereto.

That Petitioner's foregoing reading of *Arnett* and *Mitchell* is correct is shown by the recent case of *Goss* v. *Lopez*. This decision involved high school students who were summarily suspended for ten days by school authorities for participating in disruptive activities including physical attacks on policemen, a lunch room disturbance, and a school demonstration. The Court held that even though the school administrator who authorized the suspension was present and witnessed the disruptive acts, he could *not* summarily *suspend* the students. Some kind of notice and hearing had to be afforded the students. At 43 U.S.L.W. 4185 the Court said:

> "At the very *minimum*, therefore, students facing *suspension* and the consequent interference with a protected property interest must be given *some* kind of *notice* and *some kind of hearing*. 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' *Baldwin* v. *Hale*, 68 U.S. 223, 233 (1863)." (Emphasis supplied).

The kind of notice and the type of prior hearing afforded the students depends upon the balancing test erroneously applied by the Ninth Circuit to

determine whether a prior hearing is required. As the Court said at page 4185:

> "It also appears from our cases that the timing and content of the notice and the nature of the hearing will depend on appropriate accommodation of the competing interests involved."

The holdings in *Arnett* and *Goss, supra*, are consistent with the Court's rulings in *Board of Regents v. Roth, supra*, and *Perry v. Sindermann, supra*. In the latter two cases the Court delineated the rights of faculty members at state institutions. All such faculty members who can show a legitimate claim of entitlement to continued employment must be afforded a hearing *before* their property interest in said employment can be terminated. In *Roth* the Court said at pages 569-570:

> "When protected interests are implicated, the right to some kind of *prior* hearing is paramount."

and continued at pages 576-577:

> "Similarly, in the area of public employment, the Court has held that a college professor dismissed from an office held under tenure provisions, *Slochower v. Board of Education*, 350 U.S. 551, and college professors and *staff members dismissed during the terms of their contracts, Wieman v. Updegraff*, 344 U.S. 183, have interests in continued employment that are safeguarded by

> due process. Only last year, the Court held that this principle 'proscribing summary dismissal from public employment without hearing or inquiry required by due process' also applied to a teacher recently hired without tenure or a formal contract, but nontheless with a clearly implied promise of continued employment. *Connell v. Higginbotham*, 403 U.S. 207, 208." (Emphasis supplied).

Since this Court has held that a faculty member and a student have protected interests in the continuation of their status sufficient to prohibit suspension without prior notice and a prior hearing, the Head of a Department of Surgery is entitled to the same due process protection. *Hostrop v. Board Of Junior College District No. 515*, 471 F.2d 488, 494-495 (7th Cir. 1972). Looking at the matter from another perspective, it hardly makes sense for the Constitution to mean that Petitioner's driver's license cannot be suspended by the State of Arizona without affording him a prior due process hearing, *Bell v. Burson, supra*, but that Arizona can lawfully summarily suspend him from a position which is the capstone of an academic career to a surgeon.

Thus, the Circuit Court's decision conflicts with the foregoing decisions of this Court requiring that Petitioner be afforded some kind of notice and some kind of hearing before suspension as Head of the Department of Surgery when, as here, no extraordinary or emergency circumstances exist.

3. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THE SEVENTH CIRCUIT IN *HOSTROP V. BOARD OF JUNIOR COLLEGE DISTRICT NO.* 515, 471 F.2d 488, 494-495 (7th Cir. 1972), HOLDING THAT A COLLEGE ADMINISTRATOR HAVING PROTECTED INTERESTS WAS ENTITLED TO NOTICE AND HEARING BEFORE BEING DEPRIVED OF THOSE INTERESTS.

The United States Court of Appeals for the Seventh Circuit, relying upon *Board of Regents v. Roth*, 408 U.S. 564 (1972), held in *Hostrop v. Board Of Junior College District No. 515*, 471 F.2d 488, 494-495 (7th Cir. 1972), that a college administrator who asserted protected interests entitled to due process procedural safeguards was entitled to notice and hearing *before* being deprived of those interests, and that the interests of the state were balanced against those of the administrator only for the purpose of determining the *form* of that *prior* hearing. The opinion stated at 471 F.2d 494-495:

> "Having found that plaintiff has asserted protected interests that are entitled to due process procedural safeguards, we must balance the interests of the state against those of the individual to determine the *form* of hearing that Dr. Hostrop is entitled to *before* his termination. Board of Regents v. Roth, 408 U.S. at 570, 92 S.Ct. 2701, 33 L.Ed.2d 548. The Board's interest consists of maintaining efficiency through the prompt removal of its chief administrator when it reasonably believes that it can

no longer work effectively with and through that person. But it is questionable whether efficiency is a compelling interest, so that this consideration should work to deny a hearing for one college president when courts have rejected it as a rationale for denying hearings to thousands of other employees. *See* Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); Kennedy v. Sanchez, 349 F.Supp. 863 (N.D.Ill.1972). Dr. Hostrop's interests lie in protecting his first amendment rights and future employment prospects and in avoiding dismissal when it is not justified by the facts. We find that the resolution of these interests requires that plaintiff be given a notice of the charges against him, notice of the evidence upon which the charges will be based, a hearing before a tribunal possessing apparent impartiality, and a chance to present witnesses and confront adverse evidence at the hearing. Board of Regents v. Roth, 408 U.S. at 570 n. 7, 92 S.Ct. 2701, 33 L.Ed. 2d 548; Ferguson v. Thomas, 430 F.2d 852, 856 (5th Cir. 1970); Kennedy v. Sanchez, 349 F.Supp. 863, 865 (N.D. Ill.1972). *See also*, Lucas v. Wisconsin Electric Power Company, 466 F.2d 638, 652 n. 30 (7th Cir. 1972). We recognize that there are

differences between college administrators and teachers so that the Board may have different justifiable grounds for dismissing its president. A court that may be called upon to review the findings of an administrative hearing which results in the discharge of a college president will have to take the particular duties of the president and his working relationship with the school board into account." (Emphasis supplied).

In short, *Hostrop, supra*, conflicts with the Ninth Circuit's decision here that the interests of the state can be balanced against those of the individual to determine *whether* the individual with a protected interest is entitled to a due process hearing *prior* to deprivation of those rights.

4. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THE SUPREME COURT OF THE UNITED STATES IN *BOARD OF REGENTS V. ROTH*, 408 U.S. 564, 573 (1972), SETTING FORTH WHAT CONSTITUTES A LIBERTY INTEREST PROTECTED BY THE *FOURTEENTH AMENDMENT*.

Board of Regents v. Roth, 408 U.S. 564, 573 (1972), promulgated at least two tests in determining whether the liberty guaranteed by the *Fourteenth Amendment* was violated in terminating a state employee. They are: (1) whether the termination is based on charges which "might seriously damage . . . [the employee's] standing and

associations in his community" or (2) whether the state, in terminating the employment, "imposed on . . . [the employee] a stigma or other disability that foreclose[s] his freedom to take advantage of other employment opportunities." The Court gave, as one illustration of the first test, the case where the employee was charged with dishonesty or immorality, and illustrated the second test by citing the example of the state invoking regulations barring the employee from public employment in state universities.

Here the Ninth Circuit applied only the first of these two tests, applied it incorrectly by testing it only against the single example thereof of a charge of dishonesty or immorality, and erroneously concluded therefrom that Petitioner's liberty interests were not imparred here.[13] Had the Ninth Circuit proceeded either to apply the first test properly or the second test of whether the suspension as Head imposed a stigma or other disability that foreclosed Petitioner's freedom to take advantage of other employment opportunities as a Head of a Department of Surgery, its own findings would have required a ruling that Petitioner's liberty interests were implicated.

For example, the Circuit Court's opinion expressly stated:

(1) "We recognize that the suspension probably does adversely reflect on appellant."

(2) "Perhaps a suggestion of incompetence does result."

Hence, under the second or stigma test, Petitioner's liberty interest was implicated under the Ninth

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13 Appendix B, pages A-22 to A-23.

Circuit's own findings. Furthermore, the District Court conceded that "plaintiff has received no offers of employment from other universities as head of a department . . . during the pendency of this controversy," and "[i]ndeed, it is not likely that plaintiff will receive such offers until this dispute is brought to a final resolution."[14] Petitioner's freedom to take advantage of other employment opportunities as Head of a Department of Surgery were foreclosed as a result of the stigma cast on his professional reputation as a Head.

Also, the proper application of the first test - the damage to the employee's standing and associations in his community standard - to the Ninth Circuit's findings requires a conclusion that Petitioner's liberty interest was implicated. The Ninth Circuit, although carefully noting in footnote 5, that it did not even wish to intimate that Petitioner in fact refused to perform tasks assigned by the administration or that his lack of cooperation ever damaged either the medical school or the hospital, did thereby affirm its view that Petitioner had not "cooperated" with the administrators as it implied a department head should. Hence, a charge of lack of cooperation was made against Petitioner in his capacity as Head of the Department of Surgery. Assuming arguendo that the Circuit Court was correct in its assumption that it is the primary function of the chief representative of the department faculty, the department head, to "cooperate" verbally with the University administration, *Schell v. Board of Trustees*, Civil Action No. 4673 (D. Del. July 31, 1973) at 44-45, ruled that dismissal of an educator for insubordination constituted a stigma within the meaning of *Roth*. Dismissal for insubordination "could result" in a stigma foreclosing other employment opportunities. *Stout v. Whiteaker*, 379 F. Supp. 218, 221 (M.D. Tenn.

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14 Appendix A, page A-8.

1973) (dictum). A teacher's services discontinued after a rating of "unprofessional attitude" was applied involved reputation and good name as a teacher and fall within the meaning of liberty under *Roth*. It is enough that the stigmatizing charges "do reach those, or can reach those, who are interested in the plaintiff's professional reputation." *Suarez v. Weaver*, 484 F.2d 678, 680 (7th Cir. 1973).

Thus, the Court of Appeals' decision that Petitioner's liberty interests were not implicated is in conflict with the principles set forth in *Board of Regents v. Roth, supra*. Also, under its own final sentence that upon intrusion on a liberty interest, a pre-deprivation hearing may be required, the Circuit Court's ruling conflicts with this Court's decision.

5. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES IN *ARNETT V. KENNEDY*, 416 U.S. 134 (1974); *GOLDBERG V. KELLY*, 397 U.S. 254 (1970); AND *IN RE MURCHISON*, 349 U.S. 133 (1955), RELATING TO THE ELEMENTS OF PROCEDURAL DUE PROCESS REQUIRED BY THE *FOURTEENTH AMENDMENT* FOR A DUE PROCESS HEARING.

The Ninth Circuit's ruling, relying on *Arnett*, rested on the assumption that the hearing Petitioner would receive at the University would comport with the *Fourteenth Amendment's* requirements for a fair hearing. Three of the concurring Justices stated in *Arnett v. Kennedy*, 416 U.S. 134 (1974), that the thirty day notice and minimal hearing provisions of the *Lloyd-LaFollette Act*, 5 *U.S.C.*

§ 7501, were constitutionally sufficient *only* because full evidentiary hearings were provided following a termination. Read together with the three dissents written in *Arnett*, it is clear that at least six Justices agreed that a full evidentiary hearing was required before a final deprivation could occur and that having such a full hearing immediately after a dismissal from one's job was the only reason minimal notice and hearing provisions were permissible prior to termination. However, the procedures outlined in the *Faculty Manual* § VIII relating to dismissal of tenured faculty members do not meet the requirements of the *Fourteenth Amendment*, and therefore the District Court's Order of May 7, 1974 violates Petitioner's right to a hearing which comports with the requirement of due process.

The reasons why the administrative procedures for a dismissal hearing of a tenured faculty member at the University of Arizona do not meet the standards of procedural due process are as follows:

1. Procedural due process requires a decision by a fair and impartial tribunal. *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970); *In re Murchison*, 349 U.S. 133 (1955) (an "impartial decision maker is essential"); *Simard v. Board of Education of Town of Groton*, 473 F.2d 988 (2d Cir. 1973); *Ferguson v. Thomas*, 430 F.2d 852, 856 (5th Cir. 1970); *Lusk v. Estes*, 361 F. Supp. 653 (N.D. Tx. 1973); *Kennedy v. Sanchez*, 349 F. Supp. 863, 865 (N.D. Ill. 1972). An impartial tribunal is the most important and basic element of procedural due process since "[a]ny other collateral procedural guarantees are largely without meaning if the deciding tribunal has in some way adversely prejudged the merits of the case." *Simard, supra*, at 993.

Here the Committee on Academic Privilege and Tenure cannot be an impartial tribunal because

one of the three members is appointed by the University President, the person who dismissed Petitioner, and whose bias and prejudice was conceded at the preliminary injunction hearing herein when he stated that Petitioner did not deserve a hearing. Respondent's appointee, the President's appointee, along with the other member, then choose a third member giving the University President, whose decision is being appealed from, an equal voice on the Committee.

2. Next, due process requires a hearing before a tribunal with the power to render a decision which is effective. Here, the hearing by the Committee on Academic Privilege and Tenure is nothing more than a "recommendation" by the Committee to the University President who testified it was not binding on him and that he would not adopt it if Petitioner's reinstatement as Head was proposed by the Committee.

3. Procedural due process requires that the notice of charges be sufficiently detailed to permit the individual to adequately respond. *Whitney v. Board of Regents of University of Wis.*, 355 F. Supp. 321, 324 (E.D. Wis. 1973); *Wagner v. Little Rock School District*, No. CR-72-C-59 (E.D. Ark. Sept. 17, 1973); *Lafferty v. Carter*, 310 F. Supp. 465 (W.D. Wis. 1970). The provisions governing a hearing before the Committee on Academic Privilege and Tenure do not require that the faculty member whose dismissal is recommended be supplied with charges detailed enough to make effective refutation possible. It is not required by the Faculty Manual that Petitioner be furnished with a list of charges sufficiently detailed enough to enable Petitioner or his counsel to make intelligent decisions or adequate investigations concerning his defense.

4. Procedural due process requires that the individual with a protected interest be given notice,

in advance of the hearing, of the names of the witnesses against him and the nature of their testimony. *Hostrop v. Board Of Junior College District No. 515*, 471 F.2d 488, 495 (7th Cir. 1972); *Ferguson v. Thomas*, 430 F.2d 852, 856 (5th Cir. 1970); *Lusk v. Estes*, 361 F. Supp. 653 (N.D. Tx. 1973); *Whitney v. Board of Regents of University of Wis.*, 355 F. Supp. 321, 324 (E.D. Wis. 1973). In order to make a person's "opportunity to refute charges meaningful he must be told their source." *Whitney, supra*, at 324.

The Committee on Academic Privilege and Tenure is required only to furnish the faculty member whose dismissal is proposed with a list of the witnesses, not the nature of their testimony. Thus, Petitioner and his counsel cannot know until the time of his hearing what charges are being made against him by each of the proposed witnesses.

5. Another minimum requirement of procedural due process is the right to cross-examine those who have provided adverse information upon which the charges are based. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 367-368 (1970); *McNeil v. Butz*, 480 F.2d 314, 322, 325 (4th Cir. 1973); *Hostrop v. Board Of Junior College District No. 515*, 471 F.2d 488, 495 (7th Cir. 1972); *Sindermann v. Perry*, 430 F.2d 939, 944 (5th Cir. 1970); *Moore v. Gaston County Board of Education*, 357 F. Supp. 1037, 1041 (W.D. N.C. 1973); *Whitney v. Board of Regents of University of Wis.*, 355 F. Supp. 321, 325 (E.D. Wis. 1973).

However, the rules governing hearings held by the Committee on Academic Privilege and Tenure provide that: "The chairman *shall* initiate and ask questions of the witnesses. *All* questions of the witnesses, regardless of source, *shall* be asked through the chairman, or shall be directed at his discretion." Hence, neither Petitioner nor his

counsel has the right to cross-examine those witnesses who have provided adverse information upon which the charges are based.

6. Also, procedural due process requires an open hearing. *Fitzgerald* v. *Hampton*, 467 F.2d 755 (D.C. Cir. 1972).

The rules governing hearings held by the Committee on Academic Privilege and Tenure make no provision for an open hearing.

The foregoing show that even if a person with an interest protected by the *Fourteenth Amendment* could be deprived of that interest without prior notice and a pre-suspension hearing, the hearings of the Committee on Academic Privilege and Tenure do not comply with the notions of fair play and essential justice that procedural due process contemplates. *Hannah* v. *Larche*, 363 U.S. 420 (1960); *Greene* v. *McElroy*, 360 U.S. 474 (1959).

6. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE DUE PROCESS RIGHTS OF THOSE EDUCATORS WHOSE FUNCTION WITHIN A PUBLIC EDUCATIONAL INSTITUTION IS TO ARTICULATE NOT ONLY THEIR OWN VIEWS ON EDUCATIONAL PHILOSOPHY BUT THOSE OF THE DEPARTMENT FACULTY EACH REPRESENTS.

Petitioner is a world renowned academician and surgeon. Presumably that is why he was sought by the University of Arizona, and was able to develop what the University President stated was

a "very strong academic unit that is attracting national attention." Such a man and such a department faculty which he served as chief representative within the institution cannot progress in the natural sciences without the safeguards of academic freedom. His and their words as to the educational philosophy which should be applied in the running of a medical school cannot be infringed upon or deterred or punished if the *First Amendment* is to be applied. Political power can no more suspend such Department Head without prior notice and hearing *solely* for differences of opinion than it could terminate him or the department faculty for such reason.

A state university is not a military organization whose function is to impose the will of its government. It educates and searches for the truth. Hence, the Head of a Department of Surgery, the chief representative of the department faculty within the institution, cannot be suspended under the *First Amendment* solely for words which express his and the department's opinions as to how the medical school should be operated. The Circuit Court expressly ruled that it did not even wish to intimate that Petitioner ever refused to perform tasks assigned by the University administration or that his differences of opinion ever damaged either the medical school or the University. Thus, the loyalty and cooperation relied on by the Ninth Circuit to deny Petitioner a pre-suspension hearing are, in such a context, synonyms for orthodoxy, and it is only one step from there to the genetic theories of Lysenko.

How a medical school is administered or how it is to be operated is simply the expression of educational philosophy about which all faculties differ. If the *First Amendment* does not protect the right of a Department of Surgery faculty and its Head to verbalize the former's educational philosophy under circumstances where such Head performs

all tasks assigned by the University administration and such differences of opinion never damaged the medical school or the University, its protective umbrella has a hole too huge to make it worthy of the name. To rule that expression of educational views alone are a "potential threat" to the University and that such a potential threat is sufficient to deny the faculty's chief representative a *Fourteenth Amendment* pre-suspension hearing is to conclude that administrators do more than administrate, they proclaim and enforce dogma.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

ERLE E. PEACOCK, JR., Plaintiff, v. BOARD OF REGENTS OF THE UNIVERSITIES AND STATE COLLEGE OF ARIZONA; et al., Defendants.	No. CIV 74-123 PHX-HBT ORDER RE PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

This action was instituted by Dr. Earl Peacock, Jr. for money damages and equitable relief against the above named defendants. The suit stems from the termination of Dr. Peacock as Head of the Department of Surgery, College of Medicine, University of Arizona, on October 25, 1973, and his subsequent suspension as Professor of Surgery on February 11, 1974.

Pending trial on the merits, plaintiff has asked this court for a preliminary injunction ordering his immediate reinstatement as Head and Professor of Surgery at the College of Medicine.

I. Jurisdiction

Plaintiff bases federal jurisdiction on 28 U.S.C. §1331 (Federal question) and 28 U.S.C.

§1343(3) and (4) (Civil rights). The causes of action are alleged to arise under 42 U.S.C. §1983 and the First and Fourteenth Amendments to the Constitution. The matter in controversy is alleged to exceed $10,000.

Defendants have interposed a jurisdictional objection with respect to defendant Board of Regents. Defense counsel argues that the Board of Regents is not a proper defendant under §1983 and that the United States Constitution does not specifically provide anyone with a right of action absent reference to the Civil Rights Act of 1871, 42 U.S.C. §1981 et seq.

For the purposes of this order, and in view of the fact that this court has jurisdiction over the Regents themselves, both as individuals and in their representative capacities, Whitner v. Davis, 410 F.2d 24 (9th Cir. 1969) and also in light of City of Kenosha v. Bruno, 412 U.S. 507 (1973), this court decides that jurisdiction over the Board of Regents is properly averred under 28 U.S.C. §1331.

II. Brief history

Prior to joining the University of Arizona's faculty, Dr. Peacock was Professor of Surgery at the University of North Carolina. During 1968 plaintiff was persuaded by Dr. DuVal, a former acquaintance, to join the medical faculty at the University of Arizona as professor of surgery and to establish and head a department of surgery.

After arriving at the University of Arizona in early 1969, plaintiff recruited outstanding surgeons to join him, and he organized what is generally recognized as a unique and innovative academic and clinical program at the College of Medicine.

In April 1972, plaintiff received his first

written notice that his performance as Head was less than satisfactory. Dr. DuVal, as Dean of the College of Medicine, wrote that certain actions taken by plaintiff appeared to reflect an attitude that the Department of Surgery's welfare took precedence over that of the College of Medicine. Dr. DuVal further indicated that if such interpretation were correct then those actions were a "serious breach and overextension. . .of responsibilities" and would substantially undermine the confidence that Dr. DuVal had had in plaintiff.

Matters drifted until May 11, 1973, when Dr. DuVal returned to the University campus from an assignment in Washington, D.C. He was immediately apprised of a report made by the Liaison Committee of the Association of American Medical Colleges and the American Medical Association* which was critical of the operation of the department of surgery. Dr. DuVal at that time asked Dr. Peacock to resign as Head of the Department of Surgery. Over the next several weeks Dr. DuVal and Dr. Peacock conferred as to how this could be most satisfactorily accomplished from Dr. Peacock's point of view. During these discussions Dr. DuVal repeatedly told plaintiff that the request for resignation in no way reflected on his excellence as a surgeon, instructor and researcher, but rather was required because of his inability to work harmoniously and cooperatively with his fellow heads at the College of Medicine. It should be noted that these discussions were on a very personal and confidential basis. Despite the dissatisfaction with the

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*The Association of American Medical Colleges and the American Medical Association jointly participate in the accreditation of schools of medicine through the agency of the Liaison Committee which consists of six representatives from each of the Association's councils, two "public" members, and one representative of the Federal government.

plaintiff's performance as Head, and during the negotiations regarding the time and manner of termination, the University renewed the plaintiff's contract as Professor and Head of the Department of Surgery through June 30, 1974.

In the months leading up to the dismissal, the parties continued to engage in dialogue regarding the problems presented by Dr. Peacock's continuation as Head and regarding the least painful way of securing a "transition" in the leadership of the Department. Finally, convinced that Dr. Peacock would not resign, the University dismissed plaintiff without notice and hearing as Head of the Department of Surgery on October 25, 1973.

Between October 25 and January 31, 1974, Dr. DuVal acted as Head of the Department of Surgery. Although meetings were called to generate support for plaintiff, the school and the department functioned in an acceptable manner. However, during these months lines were drawn, and statements were made that reduced the chances of peaceful resolution. Repeatedly, Dr. DuVal had to defend and explain publicly the actions of the Administration. Plaintiff, on the other hand, orchestrated an effort, both within and without the walls of the campus, to win his reinstatement. Significantly, on December 5, 1973, the University offered plaintiff (although maintaining that he had no right to it) a hearing to determine the justness of its decision to terminate. Plaintiff ignored this offer.

On January 31, 1974, defendant Dr. Lindsey was appointed as Acting Head of the Department of Surgery, and what had before been a simmering yet containable conflict erputed (sic) into a bold contest of authority. On the basis of the record thus far it is not evident to what extent plaintiff was responsible for the contempt and disrespect which greeted Dr. Lindsey on his assuming the position as Acting Head. It is clear, however, that plaintiff

enjoyed immense loyalty within the Department and that a considerable amount of tension would have existed without any effort on plaintiff's part.

Following Dr. Lindsey's appointment, the atmosphere in the Department, as characterized by the defendants in their testimony, was "tense and explosive." While such a description may be overdrawn, it appears to this court that the Department was in a state of turbulence and that its ability to carry out its educational functions was substantially impaired.

Faced with this situation, the Administration decided that two competing centers of authority and allegiance could not exist within the Department. Consequently, upon the recommendation of both Drs. Lindsey and DuVal, the Administration suspended plaintiff, with pay, as Professor of Surgery and informed him of the manner in which to set in motion the available grievance procedures.

III. Preliminary Injunction

In view of the plaintiff's contentions, it is imperative that this court state what this case does not involve. It does not involve academic freedom. Bickering and disputes between heads of departments is not protected speech within the First Amendment. Plaintiff directed the Department of Surgery in apparent disregard of the interest and well-being of other departments. He applied for funds independently rather than jointly in those areas where departmental jurisdiction overlapped. He acted to increase the number of patients for the Department of Surgery without consulting other department heads and with little care that other departments were being deprived of patients. Upon dismissal as Head, plaintiff acted to seize and retain the authority of Department Head. The verbalization of aggressive conduct does not bring plaintiff within the safe harbor of the First Amendment.

Watts v. Bd. of Curators, University of Mo., 363 F.Supp. 883 (W.D. Mo. 1973). A university has the right to expect a professor to follow instructions and to work cooperatively and harmoniously with other members of the faculty. Chitwood v. Feaster, 468 F.2d 359 (4th Cir. 1972).

This case does not involve the extent to which democratic principles are relevant in academe. Plaintiff argues that a department head is a representative of the department faculty and as such must be accountable to, and only to, that constitutency. While such a university organization could be defensible as a matter of educational policy, it does not appear to be required either by the Constitution or any statute. The character or nature of department head is not a matter for this court to decide, rather it is a matter to be left to collective bargaining and private persuasion.

The main issues are:

1. Whether the plaintiff has an interest protected by due process either as Head or Professor,

2. Whether due process requires a pretermination or presuspension hearing, and

3. If so, whether reinstatement is the only relief available.

Before a preliminary injunction can be granted, it is incumbent upon a court to consider four factors:

1. The threat of irreparable harm to plaintiff if the injunction is not granted;

2. The injury that granting the injunction would inflict on the opposing party;

3. The probability that petitioner will succeed on the merits at subsequent trial; and

4. The larger public interest.

Ross-Whitney Corp. v. Smith Kline & French Labs., 207 F.2d 190 (9th Cir. 1953); Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970), aff'm on other grounds 405 U.S. 727 (1972); Yakus v. U.S., 321 U.S. 414 (1944).

In analyzing plaintiff's contentions that he was deprived of both liberty and property without due process of law by his termination as Head and suspension as Professor, the two acts will be separately treated.

A. Headship

1. Liberty interest

Plaintiff alleges a violation of a protected liberty interest in the manner in which his employment as Head was terminated. Liberty as protected by the Fourteenth Amendment is "not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life. . .and generally to enjoy those privileges long recognized. . .as essential to the orderly pursuit of happiness by free men." Board of Regents v. Roth, 408 U.S. 564, 572 (1972) quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

Attaching a badge of infamy is a restraint of liberty. Plaintiff, however, was never accused of any serious delinquency or charged with unsavory character traits such as dishonesty or immorality. In no way has plaintiff's good name or reputation, honor or integrity been impugned by defendants. The University and witnesses testifying in this motion expressed nothing but admiration and

respect for Dr. Peacock. "Brilliant" and "outstanding" were adjectives frequently used by the witnesses in this case when describing plaintiff as a teacher, surgeon and person.

Future employment has not been foreclosed plaintiff, though it is understandable that plaintiff has received no offers of employment from other universities as head of a department or professor of surgery during the pendency of this controversy. Indeed, it is not likely that plaintiff will receive such offers until this dispute is brought to a final resolution.

On the state of the record, plaintiff has failed to show that his dismissal as Head of the Department of Surgery violated any protected interest in "liberty."

2. Property interest

Plaintiff alleges a property interest in his employment as Head on various grounds. First, that he has an interest secured by a contract with the University. Second, he contends that his expectancy was of employment as head for 6-10 years since that was the period of time that he and Dr. DuVal estimated as necessary to fully establish the Department of Surgery. Third, plaintiff argues that the method commonly used at the University to select heads, i.e. faculty consultation, created in heads so selected a protected interest.

Defendants, on the other hand, argue that headships are administrative positions; that heads serve at the pleasure of the Administration and their dismissal must remain within the Administration's unfettered discretion. Further, defendants claim that it is the "common law of the campus," Perry v. Sindermann, 408 U.S. 593 (1972), that heads serve at the pleasure of the University.

This court rejects plaintiff's contention that the 6-10 year time period discussed during preliminary negotiations preceding his arrival at the University constitutes a protected expectancy. Plaintiff was not given a contract to establish the Department of Surgery; rather he was employed as head on a year-by-year basis. While it is true that plaintiff gave up a rewarding and comfortable position at the University of North Carolina to come to Arizona, such conduct merely indicates plaintiff's confidence in his abilities and his subjective expectancy that all would proceed well in Arizona. Such a subjective expectancy is not a "legitimate claim of entitlement" as required by Roth, supra, before due process protections apply.

Next this court rejects plaintiff's argument that the method of selection of heads usually used at the University of Arizona vested in plaintiff a protected property right. The fact that plaintiff has departmental faculty support, the extent of which is a matter of some dispute, does not constitute a legitimate claim of entitlement to the headship.

If plaintiff is to have a protected property interest in his position as Head of the Department of Surgery, it must come from his written contract of employment or appointment for the year beginning July 1, 1973, and ending June 30, 1974. A term of employment set by contract has been recognized as a property interest which the state cannot extinguish without conforming to the dictates of procedural due process. Weiman v. Updegraff, 344 U.S. 183 (1952); Roth, supra; Hostrop v. Bd. of Junior College Dist. No. 515 etc. Ill., 471 F.2d 488 (7th Cir. 1972).

The document entitled "Notice of Appointment" secured plaintiff's service as both Professor and Head for the academic year 1973. It stated the compensation plaintiff was to receive, and it

required acceptance by the plaintiff. It would be anomalous to accept that plaintiff was under contract as Professor but that his employment as Head was at the will of the Administration. It appears to this court's satisfaction that the notice was in effect a contract and that plaintiff had a protected property interest in his employment as Head for the 1973 academic year.

3. Relief

"Once it is determined that due process applies, the question remains what process is due . . .[D]ue process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471 (1972). The character of the relief may depend on the importance of what the plaintiff stands to lose. Thorpe v. Housing Authority, 386 U.S. 670 (1967).

It is well settled that, absent special circumstances, due process requires that one who is deprived of a protected interest be given a hearing prior to the deprivation. Roth, supra; Skehan v. Bd. of Trustee of Bloomsberg St. Col., 358 F. Supp. 430 (M.D.Pa. 1973).

Nothing in the record indicates that as of the date of plaintiff's dismissal as head of the department, special or extraordinary circumstances required that plaintiff be dismissed without a prior hearing. Certainly the facts are far removed from those existing in Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961).

Nevertheless, plaintiff's protected interest is of short duration and he has not suffered any loss or reduction in pay. While this court cannot say that it would be futile to order a due process hearing, Kota v. Little, 473 F.2d 1 (4th Cir. 1973), it does appear that the dispute is so intractable,

Zimmerer v. Spencer, 485 F.2d 176 (5th Cir. 1973) and the threat to the University's normal functioning so great, Lucia v. Duggan, 303 F. Supp. 112 (D.Mass. 1969), that to order full reinstatement would be an impurdent use of this court's equitable power.

4. Order

The University of Arizona is ordered to reinstate plaintiff as Head of the Department of Surgery but may at its option relieve him from performing any duties as head pending a hearing in accordance with the rules and regulations, Faculty Manual, Chap. VIII 13 ed., regarding the dismissal of tenured* faculty members.

B. Professorship

1. Property and liberty interest

It is so clear as to require no citation to authority that a tenured professor has a protected property interest. Plaintiff was a tenured professor when he was suspended with pay as Professor of Surgery on February 11, 1974. This court agrees with Lafferty v. Carter, 310 F.Supp. 463 (W.D. Wisc. 1970) that when a professor is separated from the mainstream of his occupation, most especially a surgeon for whom frequent practice is vital, the consequences are major even though not measurable in financial terms. Therefore, the fact that plaintiff has suffered no immediate financial loss in no way defeats the requirement that due

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*There is in Arizona no tenure in a strict legal sense but this court uses it here to refer to what under Arizona law is designated as "continuing" appointments. Throughout this order, "tenure" will be used in the Arizona sense unless otherwise stated.

process i.e. rudimentary fairness, apply.

For reasons previously stated and equally valid with respect to the professorship, this court decides that no liberty interest was violated and no badge of infamy attached by defendants' suspension of plaintiff.

The question before this court is whether defendants denied plaintiff due process by failing to afford him a due process hearing before suspending him as professor.

2. Prior hearing

Due process requires a hearing prior to a deprivation of a protected interest absent extraordinary circumstances.* Defendants maintain that following Dr. Lindsey's appointment on January 31, 1974, several incidents occurred which created a "tense and explosive" atmosphere within the Department of Surgery, and required that the University act in a summary fashion. Among other disturbing events disclosed in the record, Dr. Lindsey was prevented from presiding, as he was entitled to as head, over a departmental meeting; conferences scheduled in one room by Dr. Lindsey were moved to other rooms either by plaintiff or his supporters. All of this was against a backdrop which included contacting the leading candidate for the College's deanship in an effort either to win

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*Cafeteria Workers, supra, is the leading case regarding the "special circumstances" test, and although it has suffered recent criticism, see McNeil v. Butz, 480 F.2d 314 (4th Cir. 1973), it has a residual vitality as attested to by Olson v. Regents of the University of Minnesota, 301 F. Supp. 1356 (D.Minn. 1969) and Moore v. Knowles, 333 F.Supp. 53 (N.D. Tex. 1971), rev'd on other grounds, 466 F.2d 531 (5th Cir. 1972).

his support or to obstruct his employment as dean and meetings in which various of the plaintiff's supporters were delegated tasks of approaching various publics, e.g. Senator Goldwater, to intercede on plaintiff's behalf.

As a result there was no specification of charges, no advance notice and no hearing preceding plaintiff's suspension. The University did, however, inform plaintiff that redress was available through the procedures set out in the Faculty Manual and that a hearing would be provided upon request. Plaintiff has thus far failed unequivocally to accept the University's offer arguing that the hearing must precede the suspension.

There are limitations on the kind of action the University can take, even in an emergency situation. It must adequately respond to the emergency in the manner least intrusive on the plaintiff's rights. Even if defendants violated due process in not tailoring the intrusion to the situation on campus, this court would not order the relief requested because the good accomplished by reinstatement would be outweighed by the harm done to the University Hospital.* A hospital is a finely balanced mechanism and surgery requires an unusual degree of cooperation and loyalty among the members of the surgical team. The conflict between the parties has escalated to the point that it is clear that it would be most difficult for plaintiff to fully reintegrate himself into the workings of the hospital unless through the mutual agreement of the parties.

3. Order

It is, therefore, ordered that the University

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* Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951).

continue effective its offer to plaintiff to hold a hearing regarding his status as Professor in accordance with the University's rules and regulations.

Plaintiff shall have ten days from the date of this order to request a hearing in accordance with the prescribed procedure of the University of Arizona. The University shall afford plaintiff such hearing within ten days of receipt of such request, unless the parties mutually agree as to a continuance thereof.

DATED: May 3, 1974.

/s/ Howard B. Turrentine
Howard B. Turrentine, Judge
United States District Court

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ERLE E. PEACOCK, JR.,

Plaintiff-Appellant,

vs.

BOARD OF REGENTS OF THE UNIVERSITIES AND STATE COLLEGES OF ARIZONA; JACK R. WILLIAMS, WELDON P. SHOFSTALL; PAUL L. SINGER, SIDNEY S. WOODS, GORDON D. PARIS, JAMES E. DUNSEATH, MARGARET M. CHRISTY, KENNETH G. BENTSON, RALPH M. BILBY and RUDY E. CAMPBELL, each of the foregoing individually and in his or her capacity as a member of the Board of Regents of the Universities and State College of Arizona; JOHN LENTZ and NORMAN SHARBER, each individually and in his capacity as President of the University of Arizona (sic); MERLIN K. DUVAL, individually and in his capacity as Vice President for Health Sciences and Acting Dean of the College of Medicine, University of Arizona; and DOUGLAS H. LINDSEY, individually and in his capacity as Acting Head of the Department of Surgery, College of Medicine, University of

No. 74-2259

OPINION

Arizona,)
)
Defendants-Appellees.)
)

Appeal from the United States District Court
for the District of Arizona

Before: LUMBARD,* KOELSCH and WRIGHT,
Circuit Judges.

KOELSCH, Circuit Judge:

Erle E. Peacock, Jr., appeals from an order of the district court granting him a preliminary injunction but for less than all the relief he sought. Our jurisdiction is predicated upon 28 U.S.C. §1292(a).

From 1969 until late in 1973, appellant was a tenured Professor of Surgery and Head of the Department of Surgery at the University of Arizona's College of Medicine, a state school. He was employed under a written contract which during the events here in issue appointed him "Professor and Department Head in the Department of Surgery" "for the fiscal year 1973-1974 effective July 1, 1973. . . ." The University, however, became dissatisfied with his administrative performance, and on October 25, 1972 (sic), summarily dismissed him as Head of the Department. An academic power struggle ensued, with further strife and bickering, during which, on February 11, 1974, the University suspended appellant as Professor of Surgery, again without a prior hearing, although in this regard offering him a post-suspension

*The Honorable J. Edward Lumbard, Senior United States Circuit Judge for the Second Circuit, sitting by designation.

hearing on his status as professor.

On February 22, 1974, appellant instituted this suit for damages and equitable relief to redress the denial of his right, allegedly protected by the Due Process Clause, to a hearing prior to being deprived by the State of his protected property interests -- his position as Head of the Department and his position as professor, both held under contract. See Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sinderman, 408 U.S. 593 (1972). Appellant also moved for a preliminary injunction reinstating him as Head of the Department, and removing his suspension as professor, until such time as the University afforded him a pre-deprivation hearing.

Ruling on the motion, the district court concluded with respect to the "headship" that appellant had a property interest in the position -- a legitimate claim of entitlement of a year's duration created by the appointment papers -- and that no circumstances existed warranting deprivation of that interest absent a hearing. However, the court declined to exercise its equitable powers to order full reinstatement. Instead, the court ordered the University to reinstate him as Head with the option of "reliev[ing] him from performing any duties as head pending a hearing in accordance with the rules and regulations, Faculty Manual, Chap. VIII 13 ed., regarding the dismissal of tenured faculty members." With respect to the professorship, the court likewise ruled that appellant had a cognizable property interest, and that his suspension without a hearing probably violated due process, but again refused to order reinstatement. It ordered the University to continue effective the offer to a post-suspension hearing.

Initially, appellant's appeal was from both aspects of the Court's order. However, he has now advised us that during its pendency the University

has reinstated appellant as professor. Accordingly, the parties stipulated that the portion of the court's order refusing to reinstate appellant as professor is no longer in issue and is withdrawn from the appeal. However, the question of the propriety of the order as it relates to appellant's reinstatement as Head of the Department remains.[1]

Appellant contends, in substance: (1) that he possessed a property interest in the position as Head of the Department for a one-year term (ending June 30, 1974, eight and one-half months after he was dismissed); (2) that due process entitled him to a pre-deprivation hearing; (3) that the district court erred in refusing to order full reinstatement because it is as a matter of law an abuse of discretion to balance rights of a constitutional dimension against the state's interest in denying those rights, see Youngstown Sheet & Tube Co. v. Sawyer, 103 F. Supp. 569, 576 (D. D.C. 1952); and, (4) that this court must remedy the district court's error now by ordering appellant's reinstatement, even though his contractual appointment has expired while the case was pending on appeal.[2] The University takes the position that a headship does not constitute a protected property interest; it argues (and submits a number of supporting affidavits) that the position is quasi-administrative, that under the common law of the campus (see Perry v. Sinderman, supra) the heads of departments are appointed by and serve at sufferance of the University President, that they can attain no tenure in the position, and that they are subject to the unfettered discretion of the President, who can dismiss department heads at any time and for any reason or for no reason.

As noted, the district court found that appellant had a "legitimate claim of entitlement" created by his one-year appointment -- an interest of the sort protected under Perry v. Sinderman,

supra. We think there is a great deal of merit in the University's contention that the contractual appointment should be read as merely delimiting the term during which appellant was to serve at sufferance, see Adams v. Walker, 492 F.2d 1003, 1007 (7th Cir. 1974), and that, as the position was terminable at will, he had no protected interest in it.

> "Although comprehensive definition of the entitlement concept is not yet possible, the contexts in which prior notice and hearing have or have not been required provide guidance in determining the kinds of interests that are entitlements. An interest that gives rise to an entitlement is always a conditional interest, but not all conditional interests in governmental benefits give rise to entitlements. To create an entitlement, the law must remove the decision to grant the benefit from agency discretion. (See, e.g., Arnett v. Kennedy (1974) ___ U.S. ___, at ___ (op'n of White, J.) [42 U.S.L.W. 4513, 4535] (government employment terminable at will of government not subject to prior notice and hearing).)"

Geneva Towers Tenants Organization, etc., et al. v. Federated Mortgage Investors, Inc., et al., No. 72-2238 (9th Cir., October 2, 1974), slip opinion at 17 (Hufstedler, J., dissenting). See Board of Regents v. Roth, supra, at 578. However, in the present posture of the case, before a complete record has been developed at a trial on the merits, we are unwilling to hold that the district court's conclusion about the nature of the position was clearly erroneous.

Nevertheless, assuming that appellant had

a protected expectation of employment, we think the district court's order afforded him his due process rights. The University, as noted, did not provide appellant a hearing either before or after dismissing him as Head. The effect of the court's order reinstating appellant to the position but granting the University the option of suspending him from his duties pending a hearing was precisely the same as a ruling that the University action violated due process but that a hearing following a summary suspension was an adequate procedure. We think that under the circumstances of this case, due process does not require a pre-suspension hearing, and that the district court's order declining to completely reinstate appellant pending such a hearing was proper.[3/]

As we recently recognized:

> "The Supreme Court, in Goldberg v. Kelly, 397 U.S. 254 (1970), enunciated a two-step process for analyzing cases involving deprivation of a governmental benefit. First, it must be ascertained whether the interest at issue is a constitutionally protected 'property' or 'liberty' interest. See id. at 262. Second, if the interest is a protected one, the beneficiary's interest in avoiding loss must be balanced against the government's interest in summary adjudication." Geneva Towers, supra, slip opinion at 8. (Footnotes omitted.)

To amplify the second point -- "Once it is determined that due process applies, the question remains what process is due . . . [D]ue process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972). Notice and opportunity to be heard "must be granted at a

meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965). To determine whether the opportunity to be heard provided was at a time sufficiently meaningful to satisfy due process, we must balance the University's interest in the form of procedure ultimately afforded appellant by the court against appellant's interests in a more rigorous procedure. See, e.g., Goldberg v. Kelly, 397 U.S. 254, 262 et seq. (1970); Geneva Towers, supra, at 8, 13, 14-15. See Note, The Supreme Court, 1973 Term, 88 Harv. L. Rev. 13, 77, 85 (1974).

Appellant contends that absent exceptional circumstances (none of which here exists) the outcome of that traditional due process balancing test is presumptively weighted in favor of a prior hearing. He cites several cases to support his position -- Fuentes v. Shevin, 407 U.S. 67, 82 (1972); Bell v. Burson, 402 U.S. 535, 542 (1971); Goldberg v. Kelly, 397 U.S. 254, 259-260, 264 (1970); Sniadach v. Family Finance Corp., 395 U.S. 337, 339, 342 (1969) -- which, particularly Fuentes, indeed support his contention. See also Board of Regents v. Roth, supra, at 570 n.7. Before the Court's decisions last term in Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974), and Arnett v. Kennedy, 416 U.S. 134 (1974), we might have agreed. See Geneva Towers, supra, at 14; Stewart v. Pearce, 484 F.2d 1031 (9th Cir. 1973). However, in Mitchell a majority of the Court applied the traditional balancing test unaided by a presumption in favor of a prior hearing and upheld a sequestration statute which provided only a post-seizure hearing. And in Arnett the Court upheld the OEO's employee dismissal procedures, under the Lloyd-LaFollette Act, 5 U.S.C. §7501, even though the procedures provide a trial-type hearing only after termination. Three members of the Court explicitly applied a balancing test to reach the conclusion that a hearing post-removal was adequate, see 416 U.S. at 167-168 (opinion of Powell, J., with

which Blackmun, J., concurred), and 416 U.S. at 188 (opinion of White, J.); and the plurality, two members of which joined in the Mitchell majority, went further to hold that the defined removal procedures limit a claim of entitlement created by the state as much as a substantive limit, and that adherence to those procedures satisfies due process.[4/] We think the upshot of Arnett and Mitchell is that in considering the due process validity of the procedure provided we must apply the traditional balancing test without a presumption favoring a prior hearing.

So applying the test, we conclude that the procedure provided by the district court comported with due process. Appellant's interest in a hearing before rather than after he was suspended from the performance of his duties as Head of the Department was relatively slight. No financial interest is involved -- the position was not renumerated, and appellant continued to receive his full professor's pay while suspended. Clearly appellant was not threatened with the spectre of brutal need which would dictate the necessity of a prior hearing. Compare Goldberg v. Kelly, supra (welfare benefits); Sniadach, supra (wage garnishment); Geneva Towers, supra (rent increases). The suspension pending a hearing did not impair appellant's liberty interests, see Board of Regents v. Roth, supra, at 573, as the proposed termination was not for any reason which might stigmatize appellant in the way that a charge of dishonesty or immorality might.

We recognize that the suspension probably does adversely reflect on appellant. The prestige that attached to the holding of the position, and whatever lustre it added to appellant's reputation as a doctor, may incidentally be temporarily diminished. Perhaps a suggestion of incompetence does result, even though the University never questioned his professional competence but sought

to remove him solely because of his lack of cooperation stemming from differences of opinion about how to run a medical school. And a suspension, of course, temporarily prevents him from performing the tasks of the position, which he may enjoy and which may contribute to the development and maintenance of his career skills. See Lafferty v. Carter, 310 F. Supp. 465 (W.D. Wisc. 1970). (However, we are here discussing appellant's suspension as Head of the Department, not as a professor of surgery; and while the record indicates that the administrative position was important to him, its deprivation did not remove him from the "mainstream of his occupation" (310 F. Supp. at 470) as a teacher and surgeon.) Whatever damage appellant will suffer by a suspension is minimized by the requirement of a prompt post-suspension hearing, which limits the duration of the suspension and the extent of the damage he will suffer should the suspension later be found to have been unwarranted.

On the other side of the ledger is the University's interest in the prevention of harm to and efficient administration of the medical school and the University Hospital. The record indicates that although the head of a department at the University of Arizona is in immediate charge of administrative matters, the President and Board of Regents, being vested with the ultimate authority of the University, possess the power to make the decisions concerning the department and bear the responsibility for its proper operation. Consultation and compromise with a department head may in the end prove the best way for the President and Board to run the school. Nevertheless, as the ultimate authority, the President and Board are entitled to have a department head follow their orders. Some measure of loyalty and cooperation is required; without that cooperation a segment of the University, here the medical school and the University Hospital, may be injured either by

misadministration or a lack of administration. Thus, the University has a significant interest in suspending a potentially recalcitrant or disloyal department head in order to keep the channels of administration properly functioning, cf. Hostrop v. Board of Junior College District No. 515, 471 F.2d 488 (7th Cir. 1972); this is particularly true if his cooperation is not likely to improve pending a hearing. We conclude that the potential tthreat[5/] to the administration of the medical school and the incidental threat of disruption of the functioning of the University Hospital was sufficient to outweigh appellant's limited interest in a pre-suspension hearing.

The various opinions in Arnett, supra, support our conclusion that the procedure ordered by the court satisfied due process. There, Justice White, in the course of expressing his conclusion that a pre-termination hearing was required, nevertheless observed:

> "One must also consider another type of cost to the Government if preseparation hearings were provided -- the necessity of keeping a person on the scene who might injure the public interest through poor service or might create an uproar at the workplace. However, suspension with pay would obviate this problem." 416 U.S. at 194.

And Justice Powell, in his concurring opinion, expressed the view that a suspension with pay was unnecessary and that a post-termination hearing was adequate. 416 U.S. at 169 n.4. And finally, the three dissenters suggested that they, too, regard a suspension with pay pending a hearing in a better light than an immediate termination.

In conclusion, we decide that under the

circumstances of this case the ordered post-suspension hearing on appellant's status as Head of the Department satisfied the requirements of due process and that the court committed no error in limiting its injunction. We emphasize that under different circumstances, involving a more serious intrusion on a protected property interest, such as the professorship, or on a "liberty" interest, or an employment relationship in which loyalty and cooperation are less imperative, a pre-deprivation hearing may be required.

AFFIRMED

FOOTNOTES

Page 4 1. As a result, we express no opinion on the propriety of the district court's refusal to order appellant's reinstatement as professor.

Page 4 2. Appellant contends that unless we order reinstatement, he will be left without an effective remedy for the district court's error in not granting preliminary relief. Cf. Stewart v. Pearce, 484 F.2d 1031 (9th Cir. 1973).

Page 6 3. We do not reach the issue of whether the court may "balance the equities" to refuse to injunctively enforce a constitutional right, as we conclude here that the court adequately enforced appellant's due process rights.

Page 8 4. Assuming that the University is correct in contending that the campus

understanding is that a head of a department is subject to discretionary removal at any time, and that in accepting the position appellant was likewise subject to such removal, the Arnett plurality's position would dictate that in that case appellant has no right to any hearing, as the removal procedures condition the substantive right. As six of nine Justices rejected the position in Arnett, we do not follow it here. See 416 U.S. at 166-67 (Powell, J.); 416 U.S. at 177-78 (White, J.); 416 U.S. at 211 (Marshall, J.). Nevertheless, we note that the distinction drawn by those six Justices between substantive and procedural limitations on an "entitlement" is somewhat illusory in this case, as the common law of the campus understanding (if it exists) that a head of department is subject to summary removal, even if for cause, may equally lead either to the conclusion that such a removal satisfies due process, or that appellant does not have a substantive entitlement. See 88 Harv. L. Rev. at 87.

Page 11 5. We do not intimate that appellant in fact refused to perform tasks assigned by the administration or that his lack of cooperation ever damaged either the medical school or the Hospital -- the University's interest in obviating a potential threat is here sufficient to justify the suspension pending a hearing.

APPENDIX C

[SEAL]

THE UNIVERSITY OF ARIZONA
TUCSON, ARIZONA 85721

OFFICE OF THE PRESIDENT

July 31, 1973

PERSONAL

Erle E. Peacock, Jr., M.D.
Head, Department of Surgery
College of Medicine
The University of Arizona
Campus

Dear Erle:

I have reviewed the material that you provided for me and was pleased to have this additional insight to the Department of Surgery. There is no question in my mind at this point that the Department has developed into a very strong academic unit that is attracting national attention. Furthermore, from the statistics that you provided, it would appear that our medical students are being exposed to a reasonable spectrum of surgical procedures. In summary, you have done an effective job of developing the Department, and you should take a considerable measure of pride in this accomplishment.

Despite this record of achievement, I do have serious doubts about your ability to continue

to administer the Department effectively because of the serious philosophical differences that have developed between you and the College administration. Therefore, I feel that it would be in your Department's best interest if you would allow a transition of leadership which would cause a minimum degree of dislocation for the Department.

While I realize from our converstaions that this will be a decision that you will find personally difficult to accept, I hope that you will see Dr. DuVal immediately and will work with him in an attempt to develop a reasonable course of action.

Yours sincerely,

/s/ John P. Schaefer

John P. Schaefer

JPS:mh
Attachments
cc: Dr. Merlin K. DuVal

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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No.

ERLE E. PEACOCK, JR.,
Petitioner,

vs.

BOARD OF REGENTS OF THE UNIVERSITIES AND STATE COLLEGE OF ARIZONA; JACK R. WILLIAMS, WELDON P. SHOFSTALL, PAUL L. SINGER, SIDNEY S. WOODS, GORDON D. PARIS, JAMES E. DUNSEATH, MARGARET M. CHRISTY, KENNETH G. BENTSON, RALPH M. BILBY and RUDY E. CAMPBELL, each of the foregoing individually and in his or her capacity as a member of the Board Of Regents Of The Universities And State College of Arizona; JOHN LENTZ and NORMAN SHARBER, each individually; JOHN P. SCHAEFER, individually and in his capacity as President of the University of Arizona; MERLIN K. DUVAL, individually and in his capacity as Vice President for Health Sciences and Acting Dean of the College of Medicine, University of Arizona; and DOUGLAS H. LINDSEY, individually and in his capacity as Acting Head of the Department of Surgery, College of Medicine, University of Arizona,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Association of California School Administrators (ACSA) respectfully moves this Court for per-

mission to file the attached brief as amicus curiae in support of Erle E. Peacock, Jr. in the case of *Erle E. Peacock, Jr. v. Board of Regents of the Universities and State College of Arizona,* No. 74-2259, October 1974 Term. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondents was requested but refused.

The issue of what type of due process hearing is appropriate when an administrator is suspended is of great interest to the members of ACSA for two principal reasons: the decision will be applied *to* them and the decision will be applied *by* them. Presently, there are a number of cases involving ACSA members pending in both federal and state courts respecting this issue.

ACSA believes its experience in public school administrative matters will be of great value to this Court in the disposition of this case.

Respectfully submitted,

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MAURICE J. NELSON,
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Association of California School Administrators,

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BRIEF AMICUS CURIAE OF ASSOCIATION OF CALIFORNIA SCHOOL ADMINISTRATORS

INTEREST OF THE AMICUS CURIAE

The Association of California School Administrators (ACSA) is a nonprofit professional association comprised of more than 10,000 members who hold administrative or supervisory positions in California education. Its members represent school administrators serving at all levels from kindergarten through higher education in all of the more than 1,000 public school districts in the State. ACSA is the largest state school administrator's association in the United States.

The ACSA member, as school administrator, occupies a dual role. First, he is an employee of the board. Second, he is agent of the board of education and, correspondingly, a member of the management team. This dual role of its members gives ACSA a strong interest in what it believes to be the central issue in the instant case: what process is due when considering state action that substantially affects a school administrator's position qua administrator.

On the one hand, ACSA has a deep concern for the employment rights of its members. Accordingly, ACSA has adopted a professional and legal assistance plan for its members under which a member may qualify for professional or legal assistance in employment related situations. The primary criterion for such assistance is whether and to what extent due

process of law has been provided to the member. Pursuant to this plan, cases involving ACSA members are now pending in federal and state courts which the instant case might substantially affect. Moreover, all of these cases are at least in part brought about by the present failure to resolve clearly what we believe to be the central issue in the instant case. Therefore, the resolution of that issue by this court would serve to reduce the volume of litigation.

On the other hand, ACSA members, as members of the management team, are charged with assisting in the formulation of policies and guidelines regarding employees (including administrators) which must comply with judicial due process. In recent years, declining enrollment and inflation have necessitated reduction in force and consequent reassignment or dismissal of school administrative personnel. School managers are forced to take actions affecting the employment rights of administrators, but must satisfy the requirements of due process. For this reason also, clear and definitive court rulings are necessary.

Recent court decisions on due process hearings provide some guidance: *Goss v. Lopez,* 95 S.Ct. 729 (1975); *Arnett v. Kennedy,* 94 S.Ct. 1633 (1974); *Mitchell v. Grant,* 94 S.Ct. 1895 (1974), but it is unclear what effect these cases should have upon the suspension of school administrators. The instant case represents an opportunity for this Court to lay down basic guidelines of due process respecting the employment rights of public school administrators which would alleviate the present uncertainty and confusion.

Thus, ACSA has a very important twofold concern about the issue of what type of due process hearing is appropriate: how it should be *applied to administrators* and how it should be *applied by administrators.* Because of the considerable experience of its members in public school administrative matters, ACSA is in a position to present arguments to this Court which might not otherwise be advanced by the parties.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW FAILS IN IMPORTANT RESPECTS TO PROPERLY CONSIDER THE ISSUE OF WHAT PROCESS IS DUE RESPECTING THE EMPLOYMENT RIGHTS OF A SCHOOL ADMINISTRATOR QUA ADMINISTRATOR.

A. The Decision Did Not Consider the Case of Goss v. Lopez, 95 S.Ct. 729 (1975).

In reaching the conclusion that a post-suspension hearing satisfied due process, the Ninth Circuit relied on two recent decisions of this Court, *Arnett v. Kennedy,* 94 S.Ct. 1633 (1974) and *Mitchell v. Grant,* 94 S.Ct. 1895 (1974). No mention was made of *Goss* decided by this Court on January 22, 1975, thirteen (13) days prior to the decision in the instant case. The court, because of its failure to consider the ruling in *Goss,* failed to apply a presumption in favor of a prior hearing where an administrator is removed from his position. Thus, in *Goss,* it was held that, to insure fairness in a student suspension proceeding, the student must be given notice of the charges and the opportunity to present his or her side. "Since

the hearing may occur almost immediately following the misconduct, it follows *as a general rule notice and a hearing should precede* the removal of the student from school." *Goss*, supra, at 740 (emphasis added).

This pre-suspension hearing rationale follows from a long line of cases which support the proposition that a pre-suspension hearing is favored whenever deprivation of a protected interest is involved. *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (garnishment procedures); *Goldberg v. Kelly*, 398 U.S. 254 (1970) (welfare benefits); *Bell v. Burson*, 402 U.S. 535 (1971) (driver's license); *Fuentes v. Shevin*, 407 U.S. 67 (1971) (repossession of household goods); *Board of Regents v. Roth*, 408 U.S. 564 (1972) (tenured professor); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (revocation of parole). Consequently, since the opinion in *Goss* supports the proposition that a due process hearing should precede suspension, the Ninth Circuit erred in its conclusion for the reason that the Court did not consider the holding of that case.

B. The Decision, By Mistaken Reliance on Arnett and Mitchell, Did Not Apply the Correct Standard to Determine What Process is Due.

The emphasis placed on *Arnett* and *Mitchell* by the Ninth Circuit to justify a post-suspension hearing is misplaced because the instant case was a summary suspension with no prior procedural protection.

1. *The Mitchell Case.* In *Mitchell*, this Court upheld the Louisiana sequestration statute allowing a

post-seizure hearing. In doing so, it pointed out that there were certain protections built into the statute to insure a fair result: the writ must issue upon specific facts shown by verified petition or affidavit, the showing must be made before a judge and issued only on his authority, a bond must be posted to protect any financial loss to the debtor, the debtor may seek immediate dissolution of the writ which must be ordered unless the creditor proves the grounds upon which it was issued, and the debtor may recover damages for loss of the use of the property as well as injury to social standing or reputation. "Considering the Louisiana procedure as a whole, we are convinced that the State has reached a constitutional accommodation of the respective interests of buyer and seller." *Mitchell,* supra, at 1901.

All these procedural safeguards occur *prior* to property sequestration. In the instant case, no procedures were afforded before summary dismissal. The instant case, therefore, is more in keeping with the *Sniadach* and *Fuentes* decision wherein a pre-deprivation hearing was requested. In deciding *Mitchell,* this Court was careful to distinguish the facts of *Sniadach* and *Fuentes* from the *Mitchell* facts. In differentiating *Sniadach,* this court said, "In *Sniadach,* the Court also observed that garnishment was subject to abuse without valid claims, a risk minimized by the nature of the security interest here at stake and the protections to the debtor offered by Louisiana procedure". *Mitchell,* supra, at 1903. To highlight the protection in *Fuentes,* this Court stated, "The Florida law

under examination in Fuentes authorized repossession of the sold goods without judicial order, approval or participation." *Mitchell,* supra, at 1904. Finally, to uphold the Louisiana statute as meeting due process standards, this Court found, "Mitchell was not at the unsupervised mercy of the creditors and court functionaries. The Louisiana law provided for judicial control of the process from beginning to end. This control is one of the measures adopted by the State to minimize the risk that the ex parte procedure will lead to a wrongful taking." *Mitchell,* supra, at 1904, 1905.

Thus, the Ninth Circuit wrongfully relied on the holding in *Mitchell* to sustain a post-suspension hearing. The facts here more closely resemble *Sniadach* and *Fuentes.* The distinctions made by this Court in those cases apply with equal force to distinguish *Mitchell* from the instant case and establish that a pre-suspension hearing should be provided.

2. *The Arnett Case.* In *Arnett,* this Court upheld the Lloyd-LaFollette Act provision that a full evidentiary hearing need not be granted prior to dismissal from a government held position. The Act provided, though, that an employee must be given written notice of the charges, a chance to file a written answer prior to removal, opportunity to make a personal appearance before an agency official, and written notice of the agency's decision stating the reasons the action was or was not sustained. Following this procedure, the employee may appeal and be entitled to an evidentiary trial type hearing.

Justice Powell, in his opinion, stated, "On balance, I would conclude that a prior evidentiary hearing is not required and that the present statute and regulations comport with due process by providing a reasonable accommodation of the competing interests." *Arnett,* supra, at 1652. He reasoned, "These procedures minimize the risk of error in the initial removal decision. . . ." Id. In *Arnett,* just as in *Mitchell,* a check on the arbitrariness of any suspension decision existed prior to action being taken.

Accordingly, reliance on *Arnett* and *Mitchell* as the standard to be followed in the instant case is unwarranted. The post-suspension hearing in both cases was upheld pursuant to some type of prior procedural protection therefore minimizing the risk of error before suspension or deprivation of property. The correct standard to determine due process in this case would be to follow the line of cases culminating in *Goss* which require a pre-suspension hearing.

C. The Decision, In Balancing the Interests of the Parties, Did Not Give Proper Weight to the Loss of an Administrative Position.

To determine the nature of the hearing to be granted in the instant case, the Ninth Circuit balanced the interests of the individual and the university. In that balancing, the court considered the individual's interest as Head of the Department to be "relatively slight." The court failed to adequately distinguish between performance as an administrator and performance as a teacher or surgeon.

As modern society increased in size and complexity, the administration of its institutions of necessity became increasingly stratified. Managerial positions were defined and created to insure the smooth operation of these institutions. Such positions are commonplace in the business world, but educational administration is relatively new among the nation's professions.[1]

To administer educational institutions (primary, secondary, university, as well as the professional schools of medicine, law, and dentistry), skills, training, and abilities are required that are different from the area supervised. Numerous textbooks have been written pointing out such differences.[2] Leadership, organization, decision making, policy coordination, evaluation, financial management are qualities necessary to successful performance. The individual in administration devotes his or her time to acquiring, developing, and applying this expertise. Consequently, a new role or profession has been created, that of administrator.

To consider the loss of the position as Head of the Surgery Department of a state university as "relatively slight" is to misunderstand the administrative function of the educational process and the operation of a university hospital. To remove an administrator from that role is to deprive him of an occupation; to

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[1]M. Nolte, AN INTRODUCTION TO SCHOOL ADMINISTRATION 46 (1966).

[2]E. Morphet, R. Johns, T. Reller, EDUCATIONAL ORGANIZATION (2d ed. 1966); S. Umans, THE MANAGEMENT OF EDUCATION (1970); M. Nolte, AN INTRODUCTION TO SCHOOL ADMINISTRATION (1966).

say he can return to the profession of teacher or surgeon is to say he can return to another profession. The role of administrator has been lost to him.[3]

The proper weight to be given the loss of an administrative position is substantial and should have been considered when determining the type of hearing required.

II. THE DECISION AFFECTS THE MANNER IN WHICH EMPLOYMENT GUIDELINES MUST BE DRAWN BY PUBLIC SCHOOL DISTRICTS TO COMPLY WITH DUE PROCESS.

California statutes cover the evaluation, suspension, and dismissal of school personnel. California Education Code §§ 13485-13490, 13408, 13411, 13412, 13402-13450. This comprehensive coverage requires implementing procedures to be adopted by all school districts in the State.

In formulating such procedures, school districts must also conform these procedures to the federal requirements of due process since property and liberty interest may be involved. In *Roth*, supra, at 577, this

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[3]INDEED, ONE ADMINISTRATOR WITH OVER 50 YEARS' EXPERIENCE RECENTLY EXPRESSED THIS CONCEPT IN THE FOLLOWING MANNER: "Rapid changes in both curriculum, and methodology in the teaching fields from which administrators are drawn erode the effectiveness of administrators as teachers if returned to the classroom. Such a return may be injurious to the pupils concerned; it may also be destructive to the mental health of dedicated professionals whose happiness is tied up with successful service in whatever role they are assigned. To school administrators, arbitrary reassignment to the classroom without supporting *objective* evidence to justify it is tantamount to capricious professional assassination." F. Honn, A PROPOSED POSITION PAPER REGARDING REASSIGNMENT OF CO-ADMINSTRATORS, 3, 4 (1975).

Court found, "Property interests are not created by the Constitution, rather, by existing rules or understandings that secure certain benefits and that support claims of entitlement to these benefits." California statutes and school district policies have created such property rights. Additionally, the suspension of an administrator may involve a liberty interest where it imposes on him a stigma or other disability that forecloses his freedom to take advantage of employment opportunities. . . ." *Roth,* supra, at 573. This court has ruled that whenever such a property or liberty interest exists, a hearing of some kind must be held, before suspension.

In sum, guidance is needed for the California school administrator, to know what process is due respecting a university or school administrators' employment rights. "The school administrator has a unique relationship to the Constitution. He must chart the course of the schools with little more to guide him than the hidden meaning in a court decision."[4] Without clear direction from this Court, California school districts and administrators will become entangled in legal claims and controversies over the question of which cases are controlling in this type of situation; those requiring pre-suspension hearing or those requiring post-suspension hearing. A resolution of this question is necessary.

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[4]M. Nolte, DUTIES AND LIABILITIES OF SCHOOL ADMINISTRATION 7 (1973).

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, we respectfully submit that the petition for Writ of Certiorari should be granted.

Respectfully submitted,

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April 25, 1975.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1388

ERLE E. PEACOCK, JR.,
Petitioner,

v.

BOARD OF REGENTS OF THE UNIVERSITIES AND STATE COLLEGE OF ARIZONA; JACK R. WILLIAMS, WELDON P. SHOFSTALL; PAUL L. SINGER, SIDNEY S. WOODS, GORDON D. PARIS, JAMES E. DUNSEATH, MARGARET M. CHRISTY, KENNETH G. BENTSON, RALPH M. BILBY and RUDY E. CAMPBELL, each of the foregoing individually and in his or her capacity as a member of the Board Of Regents Of The Universities And State College Of Arizona; JOHN LENTZ and NORMAN SHARBER, each individually; JOHN P. SCHAEFER, individually and in his capacity as President of the University of Arizona; MERLIN K. DU VAL, individually and in his capacity as Vice President for Health Sciences and Acting Dean of the College of Medicine, University of Arizona; and DOUGLAS H. LINDSEY, individually and in his capacity as Acting Head of the Department of Surgery, College of Medicine, University of Arizona,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 520 F.2d 1324, as Peacock v. Board of Regents of the Universities and State College of Arizona. The first opinion rendered by the District Court for the District of Arizona entitled ORDER

RE PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION made by the Honorable Howard B. Turrentine, United States District Court Judge, is reported in 380 F. Supp. 1081. The second opinion rendered by the same judge entitled ORDER DENYING PETITIONER'S MOTION FOR PRELIMINARY INJUNCTION AND/OR SUMMARY JUDGMENT which will not be reported, appears as Appendix A herein.

Counterstatement of Questions Presented

1. Whether, under the *First* and *Fourteenth Amendments* a tenured professor in a state university college of medicine who also serves in a nontenured administrative capacity as Head of the Department of Surgery may be suspended with pay from his administrative assignment pending a due process administrative hearing.

2. Whether in determining if a post-suspension but pre-termination hearing is sufficient to satisfy due process requirements, the trial Court is permitted to balance the university's interest in the prevention of harm to and efficient administration of the medical school and the university hospital against the employee's interest in a hearing before rather than after he was suspended with full pay from performance of duties as department head.

Counterstatement of the Case

It is the position of respondents that the Orders of District Judge Turrentine and the opinion of Judge Koelsch of the Circuit Court of Appeals adequately and effectively summarize the allegations of the Complaint and the evidence adduced at the hearing and correctly isolate and define the issues.

REASONS FOR DENYING THE WRIT

1. The decision below does not in any way conflict with any decision of the Supreme Court of the United States. It is in complete conformity on all issues with all of the applicable cases cited by petitioner and discussed by Judge Koelsch in his opinion.

2. The decision below does not conflict with the decision of the Seventh Circuit in Hostrop v. Board of Junior College District No. 515, 47 F.2d 488, 494-495 (7th Cir. 1972). Although factually similar, Hostrop is readily distinguishable from the instant case. Hostrop reached the Seventh Circuit Court of Appeals upon a dismissal of the complaint by the District Court for failure to state a claim upon which relief could be granted. Hostrop, President of a junior college circulated an ethnic studies proposal that might have offended the "sensibilities" of the Board that hired him. The publication of the memorandum was mentioned as being a prime reason for Hostrop's subsequent termination, although he was told that he would be fired without any notification of the charges against him. Hostrop's complaint concluded that the alleged facts showed a deprivation of his right to free speech and a denial of due process of law, and asked that the Court order the college to give him a full and complete hearing, enjoining the defendants from replacing him with another person as president, and declare that his dismissal violated his First Amendment rights. The United States District Court dismissed the complaint for failure to state a claim upon which relief can be granted. The Circuit Court in reversing say: "Having found that plaintiff has asserted protected interests that are entitled to due process procedural safeguards, we must balance the interests of the state against those of the individual

to determine the form of hearing that Dr. Hostrop is entitled to before his termination.

There are thus two important distinctions between Hostrop and Peacock. In Hostrop the complaint had been dismissed without a hearing, so there was no basis upon which the Court could balance the opposing interests. In Peacock, the District Court issued its order after four days of hearing and taking of factual testimony upon which to balance all of the competing interests.

In Hostrop, the Seventh Circuit ordered a pretermination hearing. In the instant case the District Court reinstated Peacock and granted him a *pretermination* hearing, the results of which were part of the record before the Ninth Circuit. (See Appendix B herein.)

The Ninth Circuit in affirming the District Court simply decided that under the circumstances of this case the reinstatement with option to suspend with pay pending a college hearing satisfied the requirements of due process and that therefore the Court committed no error in limiting its injunction.

The decision below turns upon its own facts that will affect few others than the litigants. In the Circuit Court's view, the District Court properly balanced the equities and permitted a post-suspension hearing with pay. Nevertheless, it was in fact a *pretermination* hearing. The Court held that the potential disruption greatly outweighed the limited interests of the plaintiff in a *presuspension* hearing. Moreover, the plaintiff has an adequate remedy at law for money damages, if any, that may appear after a full trial.

CONCLUSION

There is no necessity at this stage of this case for issuance of a writ of certiorari. On the contrary, the interests of justice would best be served by permitting this case to proceed to trial as quickly as possible. Thereafter, any remaining issues of moment may be considered by this Court. The petition should therefore be denied.

Respectfully submitted,

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APPENDIX A

Order Denying Plaintiff's Motion for Preliminary Injunction and/or Summary Judgment by The Honorable Howard B. Turrentine, United States District Court Judge A-1

APPENDIX B

Report on Removal of Dr. Erle E. Peacock, Jr. as Head of the Department of Surgery by The Committee on Academic Privilege and Tenure, August 20, 1974 . . . . . A-11

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

ERLE E. PEACOCK, JR., Plaintiff v. BOARD OF REGENTS OF THE UNIVERSITIES AND STATE COLLEGE OF ARIZONA; et al., Defendants.	CIV. 74-123 HBT ORDER DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND/OR SUMMARY JUDGMENT

Plaintiff has filed a motion for a preliminary injunction or, in the alternative, for summary judgment regarding Count V of plaintiff's First Amended Complaint.

Count V of the First Amended Complaint alleges that the University of Arizona's faculty dismissal procedures fall short of minimum due process, that defendants DuVal, Schaefer, and Lindsey failed to comply with the University's faculty dismissal procedures, and that plaintiff's dismissal has been initiated as reprisal for public statements, which reprisal violates the First Amendment to the United States Constitution applied to the states through the Fourteenth Amendment.

Plaintiff's motion for preliminary injunction or, in the alternative, for summary judgment rests on three grounds:

1. That the dismissal procedures of the University of Arizona violate procedural due process;

2. That the defendants have failed to comply with the University's dismissal procedures; and,

3. That the dismissal proceedings against plaintiff cannot proceed until plaintiff has received a due process hearing regarding his suspension.

Preliminary Considerations

In considering a request for a preliminary injunction, a court must weigh:

1. The threat of irreparable harm to the petitioner if the injunction is not granted;

2. The injury that granting the injunction would inflict on the opposing party;

3. The probability that petitioner will succeed on the merits at the subsequent trial; and,

4. The larger public interest.

The above factors were enumerated in this court's Order of May 3 in connection with a previous motion for preliminary injunction in this same case. That Order is hereby incorporated by reference particularly in regards to its discussion of the background to this litigation and the facts relevant to plaintiff's complaint.

The University's Dismissal Procedures Appear to Meet Minimum Due Process Requirements

It is enough to answer almost all of plaintiff's arguments to merely quote from the University's General Faculty Bylaws, Revised to September 1966.

Plaintiff contends that procedural due process requires that the notice of charges be sufficiently detailed to permit the individual to adequately respond. Section 12(b)(ii)(a) of the Faculty Bylaws requires "Service of notice of hearing with specific charges in writing. . . ."

Plaintiff next contends that procedural due process requires that the individual with a protected interest be given notice, in advance of the hearing, of the names of witnesses against him and the nature of their testimony. Section 12(b)(ii)(b) provides that the faculty member whose dismissal has been recommended has "A right to the names of the witnesses and of access to documentary evidence upon the basis of which the dismissal is sought. Adjournments shall be granted to enable either party to investigate evidence as to which a valid claim of surprise is made." While the Bylaws do not expressly provide for disclosure of the testimony of the proposed witnesses, this court believes that the conjunction of (ii)(a) requiring specification of charges with (ii)(b) requiring the disclosure of the names of the witnesses supplemented by (ii)(b)'s safeguard against surprise comports with minimum due process.

Plaintiff further contends that procedural due process requires the right to cross-examine adverse witnesses. Section 12(b)(ii)(e) provides the faculty member whose dismissal has been recommended with "A right to confront and cross-examine witnesses against him."

Additionally, plaintiff contends that procedural due process requires an open hearing. Section 12(b)(ii) states that "The hearing shall be a closed hearing unless the appellant requests a hearing open to the University."

Plaintiff further contends that due process requires that the hearing be before a fair and impartial tribunal. Section 12(b)(i) describes the composition of the Committee on Academic Privilege and Tenure [CAPT] before whom dismissal recommendations are finally heard once it becomes apparent that the customary administrative channels and the Committee on Conciliation are not able to resolve the dispute.

CAPT consists of three faculty members. One member is appointed by the University Committee on Committees, one by the President of the University, and one by these two members. The appointment is for three years, the terms of office are staggered, and members are eligible for reappointment. This court believes that CAPT has "apparent impartiality." *Hostrop v. Bd. of Junior College Dist. No. 515, etc., Ill.*, 471 F.2d 488 (7th Cir. 1972). Nothing before this court at this time indicates that the presidential appointee is a mere instrument of the President or that he is so tainted with bias by the mere fact that he is the President's appointee, that his participation in plaintiff's dismissal proceedings would make a sham and a farce of the hearings. At this stage, this court refuses to impugn the motive or character of any tenured faculty member. It is neither self-deluding nor naive for this court to assume on the present state of the record that the members of CAPT will act in ways intended to afford plaintiff the traditional safeguards of due process. *Greene v. McElroy*, 360 U.S. 474, 507 (1959).

Finally, plaintiff contends that the University's dismissal procedures are a "mockery" of due process in that the decision of CAPT is only a recommendation by CAPT to the President of the University. Mr. Justice Marshall, concurring and dissenting in *Arnett v. Kennedy*, 42 U.S.L.W. 4513 (April 6, 1974), wrote that "for the hearing to be meaningful . . . [the hearing officer's] decision [must] be entitled to some weight." The Ninth Circuit recently had before it a case in which the President of a University refused to follow the recommendation of the University's Hiring, Retention and Tenure Committee. While the specific issue was not before the court, had such a procedure made a "mockery" of due process the facts of the case would almost have compelled

some indication of disapproval. *Jablon v. Trustees of the California State Colleges, et al.*, 482 F.2d 997 (9th Cir. 1973). This court has not found, nor have plaintiff's counsel offered, authority for the proposition that the decision of the officer or collegiate body before whom the hearing is held must be binding on the President of the University.

It is difficult to understand how the University's dismissal procedures could fail to satisfy even those intent on finding fault at any cost. The University's dismissal procedures certainly satisfy this court's sense of rudimentary fairness and such fairness is what due process requires. Plaintiff's motion for preliminary injunction or, in the alternative, for summary judgment on the grounds that the University's dismissal procedures fall short of minimum due process is hereby denied.

Defendants Have Substantially Complied with the University's Dismissal Procedures

Plaintiff has not been dismissed as Professor of Surgery at the University of Arizona. Plaintiff has, however, been suspended with pay pending the outcome of hearings scheduled before CAPT regarding his recommended dismissal. Plaintiff's contention, therefore, in his motion for a preliminary injunction is that the dismissal proceedings have been improperly initiated and that they must therefore be enjoined until such time as the initiation conforms to the University's rules and regulations.

Chapter VIII of the Faculty Manual, 13th ed., August 1973, contains the provisions relevant to the initiation of dismissal proceedings. Section 8.07 (a section under the heading "Academic Appointments") states that a department head or dean shall designate a committee of at least three tenured faculty members to advise him before making his recommen-

dation as to a faculty member's "appointment, reappointment, promotion, granting of tenure, dismissal, or nonretention. . . ." Section 8.19 (a section under the heading of "Release and Dismissal"), however, authorizes any University official to recommend the dismissal, but only the dismissal, of a faculty member. Once the recommendation has been made, Section 8.20 provides the faculty member whose dismissal has been recommended with the right to request an investigation either by a committee of at least three faculty members, appointed by the dean of the relevant college, or by the Committee on Conciliation.

Plaintiff argues that the above procedures were violated in that:

1. His dismissal was "requested" and not "recommended";
2. Defendant Lindsey, who requested the dismissal, did not select a committee of three faculty members to advise him prior to requesting dismissal; and
3. Defendant Lindsey was not the Head of the Department of Surgery nor was he a dean of any college.

Since this court views the Faculty Bylaws as requiring specification of charges, this court will treat plaintiff's contention that he has not been furnished with a specification of charges sufficiently detailed to permit him to adequately respond as a fourth allegiation of noncompliance.

This court views the distinction between "request" and "recommendation" as inconsequential. Similarly, plaintiff's argument that University procedures were violated in that the person requesting the dismissal, Dr. Lindsey, was not a head of a department or dean has little merit. First, Dr. Lindsey was "Acting Head" of the Department of Surgery. Second, the University rules do not limit the power to recommend dismissal to deans or department heads. See Section 8.07. An

"Acting Head" is, if not a "Head" within the meaning of Section 8.19, a "University official" within the meaning of Section 8.07.

The defendants concede that University procedures were not followed in respect to the convening of a three-member panel to advise the dean, head, or other University official regarding the dismissal of plaintiff here. This court's May 3 Order describes the conditions at the University of Arizona, College of Medicine at the time plaintiff's dismissal was requested. The May 3 Order's recitation of facts is, in keeping with the character of these preliminary proceedings, tentative; there has not yet been a plenary hearing. Nevertheless, it is this court's view at this stage of the proceedings that the same extraordinary circumstances which appear to have existed at the College of Medicine and which justified plaintiff's immediate suspension with pay also might justify the deviation from University procedure complained of here.

Furthermore, the University endeavored to correct its error. Shortly after Dr. Lindsey requested plaintiff's dismissal, the University's Executive Vice President appears to have discovered the error in procedure. Having discovered the error, a three-member panel was convened before which certain charges were presented for their advice with respect to whether those charges, if proved, would constitute unprofessional conduct of a sufficiently serious nature to warrant dismissal. The panel advised that the charges if supported would warrant dismissal. Plaintiff complains that the panel, convened after the fact, was merely used to ratify a prior decision; that the well was poisoned by Dr. Lindsey's request for dismissal without the benefit of prior consultation. Since the University's rules and regulations provide that the head, dean or other University official contemplating recommending dismissal creates the well, i.e., convenes a panel of any three

faculty members, the error complained of here appears at this stage to have been harmless. The breach of the University's rules and regulations did not substantially compromise the integrity of the quasijudicial procedures of the University of Arizona.

Finally, were this court to accept plaintiff's argument regarding the significance of the failure to convene the advisory group, how could the University ever correct an error? One could view the situation presented here as having involved a false start: When Dr. Lindsey requested plaintiff's dismissal, that act might well have had no effect because it failed to comply with Section 8.07. However, after the panel was consulted Section 8.07 had been complied with and the requested dismissal could be deemed to be effective from that time. In short, plaintiff's contention that the University's failure to initially convene the three-member advisory panel now prevents the University from going ahead with hearings regarding plaintiff's dismissal, hearings which as discussed previously meet the requirements of due process, is hereby rejected.

Finally, plaintiff contends that the charges of which he is accused have not been specifically enough disclosed to permit him to respond. The various allegations against plaintiff are contained in Dr. Lindsey's letter of February 9, 1974, and Dr. DuVal's letter of February 19, 1974. The February 9 letter enumerates three incidents which in Dr. Lindsey's opinion substantiated the charges of disrupting the activities of the Department of Surgery, making false statements to the Acting Head of the Department thereby impeding the functioning of the Department, and making reckless statements impugning the honesty, reputation and motives of the President of the University, the Vice President for Health

Sciences and several other University officials.

This court believes that the accusations made by Dr. Lindsey in his February 9 letter are specific enough to allow plaintiff to properly prepare his defense. They are not so vague as to make effective refutation impossible.

Plaintiff Is Not Entitled to Separate Suspension Hearing

"If the employee actually threatens to disrupt the operation of the office, he could be put on administrative leave or temporarily assigned to a less sensitive position pending his hearing. . . ." J. Marshall, concurring and dissenting *Arnett v. Kennedy* supra.

"One must also consider another type of cost to the Government if preseparation hearings were provided—the necessity of keeping a person on the scene who might injure the public interest through poor service or might create an uproar at the work place. *However, suspension with pay would obviate this problem.*" [Emphasis added.] J. White, concurring and dissenting, *Arnett v. Kennedy*, supra.

At this preliminary stage of the proceedings, it is this court's view that for plaintiff to continue as Professor of Surgery would seriously threaten the integrity of the College of Medicine. It was with a view towards the larger public interest, i.e., the welfare of the University and the Hospital and the College of Medicine, that this court decided in its May 3 Order that plaintiff's suspension was a proper exercise of the University's inherent powers to maintain the minimum order necessary for spirited and robust debate and inquiry.

Plaintiff here has been suspended but continues to receive his annual salary in excess of $50,000.00 per annum. This court has ordered that defendants provide plaintiff with

hearings regarding his requested dismissal. If plaintiff's name or reputation has been injured, he will have his day in court to clear his name. If the charges are either unfounded or not of sufficient magnitude to warrant dismissal, this court believes that CAPT will make the appropriate recommendation to the President of the University. Plaintiff is not entitled to a separate post-suspension hearing in that the suspension itself is but a part of the dismissal process. It was an action taken by the University in face of what at this stage appears to have been extraordinary and special circumstances. While this court has accepted the analysis in *Lafferty v. Carter*, 310 F.Supp. 463 (W.D. Wisc. 1970) that a suspension with pay does affect a protected property interest, this court rejects the decision that such an intrusion on a property interest requires a prior "preliminary hearing." It is of the essence that the University retain authority to cope with crises on the campus. When suspension with pay is merely a preliminary action, done in the face of serious disturbances on campus, followed quickly by specification of charges and the entire panoply of due process safeguards, a post-suspension hearing is not necessary. This is not to say, however, that inquiry into the conditions existing at the time of the suspension is foreclosed. Such inquiry will no doubt be carried out in the dismissal hearings and at the trial.

Plaintiff's motion for preliminary injunction and/or summary judgment with respect to Count V of plaintiff's first amended complaint is hereby denied.

DATED: July 29, 1974.

/s/ Howard B. Turrentine

Howard B. Turrentine, United States District Judge

COPY TO: ALL COUNSEL

APPENDIX B

COMMITTEE ON ACADEMIC PRIVILEGE AND TENURE

The University of Arizona

August 20, 1974

Report on Removal of Dr. Erle E. Peacock, Jr. as Head of the Department of Surgery

Introduction

On October 26, 1973, Dr. Merlin K. DuVal in his capacity as Acting Dean of the College of Medicine distributed a memorandum to the members of the Administrative Council of the college and to various university administrators informing them that he was relieving Dr. Erle E. Peacock, Jr. as head of the Department of Surgery and was himself assuming the acting headship of the department. This change had previously been communicated to Dr. Peacock and to the members of the surgery department. This action was the culmination of nearly six months of discussions among Dr. DuVal, President John Schaefer, Dr. Peacock, and others concerning dissatisfaction of the university administration with Dr. Peacock's performance as department head. Following meetings on November 23 and 24, 1973, the Arizona Board of Regents issued a public statement that they had removed Dr. Peacock as department head.

The University of Arizona General Faculty Bylaw 12(b)(ii) provides an avenue whereby Dr. Peacock could have requested this Committee to investigate the matter, conduct a hearing, and make recommendations to the President. It also provides that the President may request this Committee to act. During the fall and winter of 1973-74, however, neither Dr. Peacock

nor the President made any approach to the Committee. In a memorandum to the faculty, dated December 5, 1973, Dr. Schaefer did note that Dr. Peacock could come to this Committee, and during the winter several surgery department members did approach the Committee. These persons did not elect to invoke the Committee's jurisdiction.

Members of the surgery department did participate with the Committee on Conciliation in an effort to conciliate their grievance concerning the removal of Dr. Peacock "without prior consultation with the faculty." That committee concluded that conciliation was impossible and so informed the parties. Its memorandum to Vice President Albert Weaver dated December 11, 1973 which reported these fruitless efforts, is firm evidence that conciliation was not possible. It, therefore, became "apparent that complainants . . . [were] unable to obtain satisfactory solutions or adjustments through the customary administrative channels and the Committee on Conciliation."

In the spring of 1974, Dr. Peacock filed a lawsuit against the Board of Regents and various university administrators which was designated as *Peacock v. Board of Regents*, No. CIV 74-123 PHX-HBT. Between March 21 and 27, 1974, a hearing on Dr. Peacock's motion for a preliminary injunction was conducted with United States District Court Judge Howard B. Turrentine presiding. On May 3, 1974, Judge Turrentine ordered the plaintiff be reinstated as department head and gave the university administration the option to relieve him from performing any duties as head "pending a hearing in accordance with the rules and regulations, Faculty Manual, Chap. VIII 13 ed., regarding dismissal of tenured faculty members." Dr. Schaefer reinstated Dr. Peacock as head and then immediately relieved him of any duties pending a hearing.

This panel of the Committee on Academic Privilege and Tenure was convened under authority of Bylaw 12(b)(ii) in order to make an investigation and recommendations upon the request of President John P. Schaefer with respect to the grievance of Dr. Erle E. Peacock, Jr. On May 9, 1974, Dr. Schaefer wrote a memorandum to the Committee in which he stated: "I hereby request that you set in motion the procedures necessary to provide Dr. Peacock a hearing on Dr. DuVal's recommendation that Dr. Peacock should be relieved of his title and all duties related to his position as Head of the Department of Surgery."

Although questions relating to removal of department heads have not heretofore been brought to this Committee, Bylaw 12(b)(ii) indicates that "as a matter of general principle, this Committee shall concern itself with complaints and grievances by members of the faculty in ways designed helpfully to supplement the regular administrative processes of adjusting such matters." The Bylaw also charges the Committee to "receive complaints in writing from individual members of the faculty or from groups of faculty members," to investigate such complaints, and to "make recommendations for solutions or adjustments of the matters involved to the President of the University."

Due to the withdrawal from consideration of this case by one member of the Committee on Academic Privilege and Tenure, Professor Willard Van Slyck, and the unprecedented increase in the number of cases which had been brought to the Committee prior to President Schaefer's request in this matter, it became apparent that it would be necessary for additional faculty members to be asked to participate in the Committee's investigation, hearing, and recommendation in this case. Dr. Russell Davis and Dr. David Hetrick, the two

remaining members of this Committee, consulted with the university Committee on Committees, Committee of Eleven, in-coming and out-going chairmen of the faculty, and other persons as to how best to increase Committee membership. It was decided that several groups of three faculty members would be established as ad hoc panels to conduct the necessary investigations and hearings on behalf of the Committee. The various panels were to be selected in the same manner as the Committee. The panel chosen for consideration of this matter is chaired by Dr. David Hetrick, an appointee of the Committee on Committees and subsequent to July 1, 1974, the chairman of the University Committee on Academic Privilege and Tenure. Dr. Raymond Thompson was selected by the President to serve. Professor Ray Davis was chosen by Dr. Hetrick and Dr. Thompson as the third member of the panel.

The Committee held pre-hearing conferences with counsel for the parties on June 7 and July 3, 1974. Mr. William R. Jones, Jr., representing the University administration, entered into a stipulation approving enlargement of the Committee and creation of this panel. Mr. William Lee McLane, attorney for Dr. Peacock, did not agree to the stipulation insofar as it related to this hearing; he did, however, endorse the stipulation insofar as it related to a subsequent hearing to be held before the same panel concerning the same parties.

At the June 7 conference a time schedule was established for the University administration to file charges with the Committee concerning Dr. Peacock, for a response from Dr. Peacock, for lists of witnesses, and for conduct of a hearing. Counsel made a waiver of the time requirements for notice in order that the case might be heard as expeditiously as possible.

On June 17 the University administration, through

William R. Jones, Jr. and Jack J. Rappeport acting as attorneys, filed two charges with the Committee. They were:

"1) that Dr. Erle E. Peacock, Jr. was removed as Head of the Department of Surgery on October 25, 1973 because he acted unilaterally and independently as a clinical department head and without regard for the impact of the results of his actions on his colleague clinical department heads and on the institution (University of Arizona College of Medicine) as a whole. As a result of the foregoing, the clinical department heads at the College of Medicine University of Arizona lost trust and confidence in Dr. Erle E. Peacock, Jr. as a department head and could not effectively work with him for the good of the University of Arizona College of Medicine.

"2) that Dr. Erle E. Peacock, Jr. in his dealings with people within the College of Medicine and outside of the College of Medicine in the community at large conducted the affairs of the Department of Surgery in an unprofessional manner inimical to the best interests of the College of Medicine."

Also on June 17 the university administration supplied the Committee with a list of witnesses it intended to call in the Committee's hearing.

A memorandum dated June 22, 1974 was sent to the Committee from the office of McLane and McLane, counsel for Dr. Peacock, confirming the position announced to the Committee at the pre-hearing conference on June 7 by William Lee McLane that Dr. Peacock would not be a participant in the headship hearing. The memorandum stated: "Please be notified that, having appealed the May 3, 1974 order of the United States District Court 'authorizing' the University of Arizona to relieve Erle E. Peacock, Jr. as Head of the Department of Surgery pending a hearing in accordance

with Chapter VIII of the Faculty Manual, Dr. Peacock will not participate in any such hearing if one is conducted." At the July 3 pre-hearing conference when Dr. Peacock was present, counsel reiterated this position. On July 9 during the hearing when Dr. Peacock appeared without counsel as a Committee witness, he read a statement of a similar nature.

The Committee regrets the position taken by Dr. Peacock and his legal advisors. Counsel could have made for our record a statement announcing that by participation in our hearing Dr. Peacock did not intend to waive any legal right which related to his appeal and did not waive any remedy which upon appeal he might be afforded. Such a reservation of rights protecting his claims respecting the appeal would have been adequate protection for the position of Dr. Peacock. The Committee recognizes that a faculty member may elect not to appear as a formal party at a Committee proceeding and may choose to come before us as a witness without being represented by counsel. Indeed the Committee wishes to express our appreciation to Dr. Peacock for complying with his duty as a member of the university community by appearing as a witness. But refusal to become a party does not prevent the Committee from carrying out its mandate in the Faculty Manual to investigate the matters in dispute and to make a report with recommendations to the President. In our judgment that investigation in this case could best be accomplished by holding an open administrative hearing.

In accordance with the discussions held during the June 7 and July 3 pre-hearing conferences, the Committee proceeded to hold public hearings at the Moot Court Room of the College of Law during the afternoon of July 3, 1974 and on July 8, 9 and 10. William R. Jones, Jr. appeared as counsel for the University administration; Dr. Peacock did not participate

as a party, nor was he represented by counsel at the hearings. The Committee exercised its right to examine witnesses for the University administration; it also called witnesses of its own, including witnesses favorable to Dr. Peacock; and it called Dr. Peacock himself. These witnesses were cross-examined by Mr. Jones. At the conclusion of the hearings the parties were advised, Mr. Jones orally and Dr. Peacock by letter, of their right to submit to the Committee proposed findings and recommendations and arguments to support them. On July 17 the administration, through Mr. Jones, supplied us with such a memorandum. Consistent with his nonparticipation as a party in the proceedings, Dr. Peacock notified the Committee that he did not wish to exercise his right to make such a submission.

The Committee, in accordance with procedures followed by administrative agencies, bases this report upon the record made in the proceedings. Various exhibits, including the transcript of the proceedings before Judge Turrentine in March 1974 and the exhibits used in that case, were introduced before the Committee and accepted by it. A transcript was kept of the two pre-hearing conferences and of the hearings. Due to a delay in obtaining the entirety of the transcript until August 2, the Committee was unable to render a report about this case prior to starting public hearings concerning another matter relating to Dr. Peacock. We did, however, reach certain tentative decisions after meeting together as a Committee on July 22 and 23. We also deliberated on August 16, and we agreed upon this report and signed it on August 20.

Since this case involves relieving a department head of his duties and title, it was essential that in making our recommendations this Committee ascertain the functions and role of a department head. Consequently, in the remainder of this report, we shall first discuss the nature of a department

headship, then make findings of fact concerning the administration's charges about Dr. Peacock's performance as department head, comment on the procedures followed in this case, and finally offer our recommendations.

Role of Department Head

In considering the role of a department head at the University of Arizona, this Committee has examined (1) the Faculty Manual, Thirteenth Edition (1973), (2) the American Association of University Professors "Statement on Government of Colleges and Universities" (1973 edition), and (3) the indications from the record in this case illustrating how the head of the surgery department functioned.

Faculty Manual. The Manual does not completely define the functions performed by department heads at the University. It does, however, list enough of them to provide a picture of the role of a department head at Arizona.

The department head is a key figure in connection with faculty and staff appointments. Although various committees may also be involved, it is the department head that makes recommendations to the Board of Regents concerning faculty and staff appointments, reappointments, nonretention, tenure, promotions, and dismissals (Section 8.03). It is the head who is required to inform faculty members of tenure and promotion decisions (Sections 8.09, 8.11-.14), who is the person to whom faculty resignations are directed (Section 8.15), who has discretion in recommending reappointment or release of a temporarily appointed faculty member (Section 8.16), and who recommends the dismissal of a faculty member (Section 8.19).

Faculty members who carry on employment for compensa-

tion beyond that called for in their job descriptions must clear such work with their department head. When the employment is outside the University and university facilities are used, the faculty member must make special financial arrangements with the department head (Section 2.29). When supplemental work is being done for the University the matter must be discussed with the department head (Section 2.31). Department heads must be informed of any conflict of interest in any government-sponsored research (Section 2.32).

Faculty leaves of absence are subject to approval by heads of departments. In the case of sabbatical leaves the head not only must give approval, but also must get evaluations of the faculty member's project (Section 2.25). For nonsabbatical leaves the head must grant approval and demonstrate that the faculty member's courses can be taught by someone else or some other adjustment can be made (Section 2.26).

Department heads have a responsibility concerning university property. They are charged with the care and custody of departmental equipment (Section 2.21). They sign purchase orders for equipment repairs (Section 2.20) and for book purchases (Section 4.09G). They also must approve travel orders (Section 2.24) and certify staff members' dependents for special fees (Section 2.38).

When a faculty member is unable to meet a class, he must notify his department head so a replacement may be found (Section 3.10). To facilitate this the Code of Conduct requires such a notification (Section 9.02), and another rule designates the department head as the person to whom faculty members must report illness or accident which cause their absence from duty (Section 2.58).

Complaints about faculty members are channeled to the department heads (Section 9.03), and appeals from faculty grading are handled by them (Section 3.18).

Among other duties and responsibilities of department heads is granting approval to students to act as tutors (Section 2.35), transmittal of course and curricular materials to appropriate university officials (Section 2.41), giving approval to off-campus questionnaires using the name of the University (Section 2.43), transmitting teaching load reports (Section 3.07), giving out field trip forms (Section 3.26), proposing university guests (Section 6.13), and getting notices of address changes of faculty and staff members (Section 2.46). Letters of resignation must be sent to heads (Section 2.51); inventions must be disclosed to them (Section 7.02-4 [a]); and requests for legal opinions must be channeled through them (Section 2.53).

It is clear from this recital that the Faculty Manual lists many duties and powers of department heads which fairly can be characterized as administrative in character. Some of these designated duties and powers are discretionary, others are ministerial; some of them have a direct relationship to the academic affairs of the department, others do not. But they all deal with management of the affairs of the department. When the additional powers of budgeting and selection of committee members are added to the list of departmental headship powers, it becomes even more apparent that, even though a head may also teach, at the University of Arizona in his role as head he is an administrator.

The Manual does not in any place give a specific listing of all university personnel regarded as administrators. It does, however, contain Faculty Bylaw 12(b)(iv) which in referring to the Committee on Academic Privilege and Tenure states: "Department *heads* and other *administrative officials* should intimate as soon as possible to new members any sense of dissatisfaction" (emphasis ours). This provision certainly regards a department head as an administrator.

AAUP Statement. Reference has been made in this case to the position of the American Association of University Professors concerning the role of a department head. The complete paragraph from that organization's "Statement on Government of Colleges and Universities" which appears to be in point reads as follows:

"The chairman or head of a department, who serves as the chief representative of his department within an institution, should be selected either by departmental election or by appointment following consultation with members of the department and of related departments; appointments should normally be in conformity with department members' judgment. The chairman or department head should not have tenure in his office; his tenure as a faculty member is a matter of separate right. He should serve for a stated term but without prejudice to re-election or to reappointment by procedures which involve appropriate faculty consultation. Board, administration, and faculty should all bear in mind that the department chairman has a special obligation to build a department strong in scholarship and teaching capacity." (See page 38 of "Statement.")

The main thrust of this paragraph is with respect to selection procedures for department heads. It also refers to the head as the "chief representative of his department within an institution," and notes his "special obligation to build a department strong in scholarship and teaching capacity." Both departmental representation and building can be characterized as involving, at least in part, performance of administrative functions.

The statement distinguishes between a person's role in the "office" of chairman or department head in which there is no tenure, and the separate right of the individual to tenure as a

faculty member. This notion that a head does not have tenure as head is consistent with section 8.06 of the Faculty Manual which states: "A member of the University faculty who holds an administrative position does not have tenure in the administrative appointment, and he does not lose academic tenure by appointment to or relief from an administrative appointment." The two provisions are parallel.

Surgery Department Functioning. Although administrative functions of the Department of Surgery were more widely sub-delegated than in many other departments of the University, the transcript of testimony shows that during his headship Dr. Peacock did personally exercise many administrative functions. For example, in the area of finances, he approached the Veterans' Hospital manager over funding of the hemodialysis program, and he offered the head of the pediatrics department financial underwriting of that department's graduate education program if collapse of the Tucson Hospitals Medical Education Program should undercut it. Dr. Peacock viewed his role as department head as including handling such external relationships as entering an objection to press coverage of a kidney transplant by another member of the surgery faculty, publicly dressing down a professor from another department in the college over a subject of concern generally to the surgery department, asking the Attorney General's office for legal information concerning the Crippled Children's Services, and becoming involved in the controversy over the appropriateness of the Tucson Hospitals Medical Education Program as a competing surgical residency program, even though he was not a member of the committee which was to look into the matter. Dr. Peacock attended and vigorously participated in various meetings in which administrative matters were discussed. He and the other clinical

department heads had weekly meetings. He attended the Dean's Committee meetings in connection with clinical work at the VA hospital.

Within the department Dr. Peacock certainly exercised an administrative role in his actions with respect to faculty meetings. He chaired the major part of most meetings; he prepared the agenda and noted it on the blackboard; he prepared the official minutes of faculty action. It was through the efforts of Dr. Peacock that much of the faculty recruitment was carried out. Although as the department grew other faculty members played a significant role, in the final analysis it was Dr. Peacock who made the recommendations for their employment. As recently as the spring of 1973 he hired Douglas Lindsey as a member of the faculty.

Several surgery department members testified before the Committee that they did not regard a department head as an administrator. In spite of that, they made it quite clear that they did regard Dr. Peacock as their "chief representative" within the College of Medicine; they praised him for building a strong department; and they acted with respect to him as though Dr. Peacock were in fact an administrator.

Relationships of Department Heads. During the hearings in this case much was said about departmental democracy, especially about that principle of democracy which involves reaching departmental decisions by majority vote. The evidence shows that in the surgery department the concensus mechanism often led to unanimous votes.

We should also be cognizant of some of the other principles of democracy which are important in academia as well as in government. Among them is the concept of checks and balances that requires operating within the established framework of the University for conducting departmental affairs. A

department functions within the University, not as an independent unit, but as an entity subject to certain checks and balances. It must work with and adjust to comparable units, that is, other departments. It must function within a framework which gives such administrative officials as deans veto power in certain instances over what the department may want to do. The department must be prepared to respond to these lateral and vertical objections to its proposals and actions by willingness to compromise, rather than by insisting that its position must prevail at all cost simply because it is the result of some form of majority concensus within the department.

The head of a department must be more than the representative of the departmental faculty. He also is a member of the administration. He cannot function effectively unless he has the confidence of both his faculty and the college administration. The department head also must be able to relate well to heads of other departments whose educational functions are related. The head must be able to communicate within his own department, to other departments, and to the college administration. He has a special responsibility to effect compromise for the good of the total University; the self-interest of his department requires it.

Should the faculty or college administration find itself in conflict with the department head or should there arise dissension among department heads, then all parties have the responsibility of thoughtful deliberation. In such a situation the administration should be sensitive to faculty opinion. It also has the responsibility to judge in the broader context of the welfare of the college and of the University as a whole.

Findings on Charges

Traditionally at the University of Arizona department heads

have been regarded by the college and University administrations as fellow administrators; department heads have not been considered to possess tenure in their headships; and department heads have served at the pleasure of their administrative superiors in that they have been subject to dismissal without formality and for whatever reasons the college or University administrations deemed adequate. Judge Turrentine, however, upset this tradition by ruling in his May 3, 1974 order that Dr. Peacock had a contract right to his position as department head. In a Notice of Appointment dated May 24, 1973, Dr. Peacock was designated both as Head of the Department of Surgery and as Professor of Surgery. Acceptance of this document by signing it and returning it to the office of the President, according to the judge, created a contract.

Although the University administration continued Dr. Peacock's salary until the end of June 1974 and the Notice of Appointment by its terms only applied until that time, this Committee sees merit in the argument that Dr. Peacock nevertheless had a property interest which was adversely affected by his ouster as department head. Assuming that such is the case, he should not have been removed unless there was an objectively adequate basis of such action. We find that the two charges filed with this Committee by counsel for the university administration would, if substantiated by the facts, form an adequate basis for Dr. Peacock's removal.

Several witnesses, including Dr. Peacock, complained that the charges were vague and lacked the specificity necessary for presentation of an adequate defense. Had counsel for Dr. Peacock participated in the hearing and requested that the Committee require the University administration to supply a bill of particulars which would list specific incidents which might support the charges, the motion might well have been

granted. Since Dr. Peacock was not represented by an attorney at the hearing, no such motion was made. Instead the Committee, and to some extent counsel for the University administration, questioned witnesses with respect to specific incidents which could be classified as supporting one or the other or both of the charges. In his examination by the Committee, Dr. Peacock was asked about these incidents. He responded using notes previously made which indicated that he was in fact aware of which events would likely be used to substantiate the charges. Other persons called by the Committee were also well prepared to provide us with information concerning the incidents that were in question.

Testimony of the events leading to the October 1973 removal of Dr. Peacock from the headship can be categorized into six groups. They are: (1) Proposed transfer of Viet Nam War casualties, (2) Tucson Veterans Administration Hospital relationships, (3) Tucson Hospitals Medical Education Program relationships, (4) proposed transfer of Pima County Hospital patients, (5) Medical Services Plan controversy, and (6) other interpersonal relationships.

Proposed Transfer of Viet Nam War Casualties. After his decision to accept the appointment as the head of the Department of Surgery, but prior to his arrival at the University of Arizona in February of 1969, Dr. Peacock approached two officials of the Veterans Administration in Washington, D.C. with a proposal concerning transfer of certain Viet Nam War casualties from military to veterans' hospitals. Although there is conflict in testimony before us whether this action was unilateral, it was established that the manner of Dr. Peacock's approach was regarded by the officials as offensive. Dean DuVal found it necessary to repair the relationship with the Veterans Administration. At that time the College of Medicine was

planning for the use of the facilities of the Tucson Veterans Administration Hospital in conjunction with its clinical instruction until a university hospital could be constructed, and hence good relationships with the VA were essential. Dr. Peacock apologized for this incident, and Dr. DuVal did not let it inhibit him in completing the formalities necessary for hiring Dr. Peacock.

Tucson Veterans Administration Hospital Relationships. While he was heading the University's clinical instruction in surgery at the Tucson VA Hospital, Dr. Peacock antagonized the hospital administration by his conduct toward them. Two specific incidents illustrate something of these difficulties. At a Dean's Committee meeting Dr. Peacock reproached Dr. William Denny, an official of the hospital, in extremely strong terms, and, in Dr. Peacock's words, "backed him down." Dr. Denny responded with a letter to Acting Dean Jack Layton dated August 5, 1971, in which he commented: "I was astounded at the vituperation, and insulting, degrading comments delivered by Dr. Peacock. I have never been exposed to more rude manners, to less productive exchange of comments, than were delivered by Dr. Peacock. . . . We have an excellent working relationship disturbed only by Dr. Peacock's hostile and belligerent personality and his constant criticism of the Medical Service."

Dr. Denny, when he came before us as a witness, affirmed that he stood by the language quoted above. He did, however, retreat from another comment in his letter in which he made reference to Dr. Peacock firing residents. Dr. Peacock denied this and Dr. Denny withdrew his charge.

Dr. Peacock's response to Committee questions about his relationships with personnel at the VA hospital pointed out some of the deficiences at the hospital when the surgery

department undertook its clinical education program there. His concern over the problems relating to health care and medical education there was genuine; his manner of expressing it to the people involved was inappropriate. Dr. Peacock himself characterized for the Committee the impact of his conduct. "The doctor was mad, wasn't he, when he wrote that."

Another example of the difficulties in University VA Hospital relationships caused by Dr. Peacock related to funding of the hemodialysis program at the Veterans Administration Hospital in Tucson. Starting in September 1969 locally available funds were used to support the program. Because the local support exceeded the amount that the VA Washington office would approve, when other monies from Washington became available, instead of being used for other projects, they were allocated to reimburse the sources that made initiation of the hemodialysis program possible. Dr. Peacock, however, took exception to the decision, visited the hospital manager, and lodged an intense argument with him that the decision was bad. The manager filed a formal complaint with Dean DuVal who on September 15, 1970 wrote a memorandum to Dr. Peacock which stated that his "involvement in this case is meddlesome and not in the best interest of interdepartmental harmony." The director of the hemodialysis project was not a member of the surgery department.

Tucson Hospitals Medical Education Program Relationships. Before there was a medical school at the University of Arizona three Tucson hospitals had established a residency program known as the Tucson Hospitals Medical Education Program. Before the completion of the Arizona Medical Center it was very important to the school to have good

working relations with THMEP. Particularly the pediatrics and obstetrics departments, who could not do clinical work at the VA as could the other clinical departments, found cooperation essential. Nevertheless there was some tension between the school and THMEP because they operated competing graduate medical education programs.

Dr. Peacock made it quite clear that he regarded having two competing surgical education programs as inappropriate. He believed that he could not achieve educational objectives in his department by any affiliation with THMEP. At one time he negotiated for transfer of surgical patients from a hospital affiliated with THMEP which he commented would, if successful, have destroyed THMEP. In a letter to Dr. DuVal, who then was in Washington, Dr. Peacock told us that he said to him: "It is going to be interpreted as the cleaver dropping on THMEP and they are right, it is."

Although Dr. Peacock's cleaver did not in fact destroy THMEP, it did anger Dr. Eric Ramsay, the head of THMEP. With respect to this controversy Dr. Peacock told the Committee: "It looks like we got another fellow mad at me, doesn't it?' That is an accurate appraisal of Dr. Ramsay's letter of November 5, 1973 to Dr. DuVal. He noted that "in surgery . . . the relationship has been hostile and totally frustrating." He commented on Dr. Peacock's "personal antipathy," and his "repeated efforts . . . to control the county surgical patients." He then launched into an attack upon Dr. Peacock's performance at the Arizona Medical Center.

Proposed Transfer of Pima County Hospital Patients. It is the policy of the Board of Regents not to accept charity patients at the Arizona Medical Center. Pima County Hospital which is the county's charity hospital in Tucson is over-

crowded. Dr. Peacock wished to do something to take the pressure off the Pima County Hospital by taking patients from it. Although he went to the administrator of the Arizona Medical Center before contacting county officials, he did not inform Dr. Jack Layton who was at that time Acting Dean of the college. When Dean Layton learned of Dr. Peacock's action, he impressed upon Dr. Peacock that the college administration should be notified of that sort of approach outside the college. Dr. Layton testified that Peacock's action had compromised discussions he was conducting with people in the community for dealing with under-served Tucsonans.

Medical Services Plan Controversy. When Dr. DuVal returned from Washington and became Acting Dean of the College of Medicine early in 1973 he was told by Dr. Layton that there were two problems in the college that required his immediate attention. One was the difficulties with the surgery department; the other was the controversy over the Medical Services Plan. Dr. DuVal took the MSP matter up with the clinical department heads, and until March they discussed ways and means of getting the departments in compliance with the plan by revamping it so that it could effectively take care of the so-called "salary gaps"—the difference between a faculty member's state salary and the amount he could command in practice, the research needs of the departments, and the over-all needs of the college. A few department heads, including Dr. Peacock, sought a re-written plan which would (as compared with the plan forwarded by the other heads) favor the departments over the college. The majority, however, favored what could be described as the "college plan." A vote of the heads was taken on March 14, 1973 in which the majority prevailed. The matter of wording of the plan was

delegated to the dean and in two weeks he returned with the final version which then was approved. It was understood that this plan was to be presented to the Board of Regents and that after a year of experience with it the whole matter was to be re-opened. Resolution of the MSP question came only after compromise which had followed considerable controversy.

Dr. Peacock told us that he considered the March 14 vote as a mere "straw vote." Dr. DuVal did not so regard it; he considered it as a binding vote, and he understood that the department heads had agreed to be bound by a majority vote. Dr. Paul Capp, Head of the Radiology Department, sided with Dr. Peacock in the deliberations of the clinical department heads. Nevertheless he testified that it was his view that "so far as I was concerned, it was settled."

Dr. Capp further testified that "the reopening of the plan, you know, did cause some problems in terms of opening up another can of worms." It was Dr. Peacock who opened that can by attempting to persuade other department heads to reverse their position and by suggesting that surgery would withdraw from the plan. Although surgery has not done so, the threat was quite disruptive to the medical school.

Other Interpersonal Relationships. The Committee finds that in his interpersonal relationships Dr. Peacock did more than once abuse his status. Dr. Capp testified that Dr. Peacock had made a highly emotional telephone call to him concerning radon seeds. He became totally incensed over the telephone, and then stormed into the Radiology Department office and there "exhibited the kind of behavior that is difficult to put into words, totally intimidating and in an emotional uproar. . . ."

In another instance Dr. Peacock demanded a vehicle from

the car pool, was told that none were available, and thereupon acted in such a "totally intimidating" manner that he "virtually emotionally destroyed" the car pool manager. The man was so shaken that he pulled a set of keys off the wall, threw them to Dr. Peacock, locked his doors, went to his superior and said "I quit. I will take no more of this."

While they were passengers on the same airplane, Dr. Peacock braced Dr. Irwin Fruendlich, Chief of the Diagnostic Division of the Department of Radiology, about a mechanical problem in diagnostic radiology. Dr. Peacock became so upset about it that he stated to Dr. Fruendlich, "If you can't settle this, we don't want to have to get rid of you and Paul." Among the passengers who overheard the conversation was another university professor.

When Marilyn Drago, a local newspaper reporter, reported a story which Dr. Peacock apparently thought her paper had agreed not to report, he called her and, according to her testimony, "he yelled, he said that I was absolutely disgusting. . . . [H]e said I was repugnant, that no physician at the medical school would ever allow me to interview him again, that all my work was completely incompetent, it was unprofessional, it was unethical and then he said, 'How dare you call yourself a science writer?' And then he said, 'Do you realize you're going to be responsible for the deaths of 150 kidney patients?' "

Dr. Peacock apologized for this incident. It nevertheless provoked the newspaper to lodge a formal complaint with the President of the University.

Cumulative Effect. Some of these incidents are explainable as misunderstandings. Others are explained in terms of impatience, momentary anger, etc.; and apologies have been extended in some of the situations. In some of these instances

we have noted a conflict in testimony. The cumulative weight of evidence convinces us that, even though some of the specific issues are not resolved, the testimony does support the charges. In his dealings with Dr. Fruendlich, Dr. Capps, and his fellow clinical department heads within the College of Medicine, Dr. Peacock did conduct the affairs of the Department of Surgery in an unprofessional manner inimical to the best interests of the College of Medicine. His dealings with personnel of the Veterans Administration, Dr. Ramsay, and Mrs. Drago outside of the College can similarly be characterized.

Trust and Confidence. Dr. Schaefer and Dr. DuVal both testified that they had lost confidence in the ability of Dr. Peacock to perform adequately as a department head. Dr. Oscar Thorup, head of internal medicine, referred to Dr. Peacock's conduct as "disruptive" and responded in an affirmative manner to the question whether the time came when he had lost his "trust and confidence" in Dr. Peacock. Dr. Vincent Fulginiti, head of pediatrics, testified that after one incident with Dr. Peacock he could no longer trust him.

The difference between the need for trust and confidence among the department heads in the College of Medicine and the need for such relationships among other heads at the University may be one of degree; it is not one of kind. It is essential to the operation of the institution that fellow department heads can rely upon the conduct and statements of each other. It is an improper burden on these administrators to ask them to ascertain what really lies behind the words and acts of another department head.

The Committee has in its possession affidavits from all of the clinical department heads which were filed in connection with the lawsuit. They can be generally characterized as

supporting the proposition that removal from the headship of the Department of Surgery of Dr. Erle Peacock has not interferred with the programs of their departments and that his reinstatement would not improve their programs. Some of them go further and state that his presence was divisive and that his reinstatement would not be in the best interests of the College of Medicine.

Freedom of Speech and Academic Freedom. It is our judgment that Dr. Peacock was *not* removed from his headship position because he expressed differences with other persons. It was the manner of his expression that contributed to the events for which he was removed. His constitutional right to free speech has not been infringed.

Judge Turrentine has expressed his view that no issue of academic freedom is present in this case. We do not see the matter quite that simply. Although this case may not directly involve academic freedom, there are quite clearly overtones of academic freedom issues. If removal of Dr. Peacock were intended to bring about a change in the teaching approach of the department or to induce the faculty to alter its educational goals and means, then not only would it have impinged upon his academic freedom, but also upon that of the faculty members within the department. There is no indication that Dr. DuVal acted with such intent. Indeed so far as we have been able to ascertain subsequent to Dr. Peacock's removal there has been no appreciable change in either the educational goals within the surgery department or the means whereby they have been effected.

One member of the surgery department faculty reminded the Committee that the faculty must have an effective channel of communication to the administration of the college and of the university. If the dean and the president

have lost confidence in the department head, an important channel of communication is blocked and to that extent the department faculty members have lost their academic freedom. Communication involves not only channeling information from the faculty to the administration of the college, but also from the college level to the departmental level. It is entirely consistent with the concept of academic freedom to replace a department head who cannot communicate *both* ways with one who can.

Academic freedom does not imply the right of one group or department to go exclusively its own way in disregard of the institution as a whole. The dean's duty is to blend the welfare of the various department faculties with the overall welfare of the college. A department head is the message center for the necessary two-way communication.

Dr. Peacock referred to himself as a man with a "mission." His ends may have been justifiable; his means of achieving them have in the instances detailed herein been unjustifiable. His conduct as a department head made it impossible for him to work effectively with the other clinical department heads for the good of the University of Arizona College of Medicine.

Procedures Followed In This Case

Since it has been ruled that a contract interest is involved in this case, it is incumbent upon the Committee to comment upon the procedures used by the University administration in affecting that interest. Due process of law must be followed in any taking of property and a contract right is a property interest. In order to comply with due process procedure, there must be adequate notice and a proper hearing.

Dr. Peacock contends that he has not yet received notifica-

tion of the reasons why he was removed as department head. We do not agree. Dr. DuVal's testimony on rebuttal categorically stated that as early as his conference with Dr. Peacock about May 11, 1973 when he first informed Dr. Peacock that there would have to be a change in the departmental administration, he gave Dr. Peacock a list of reasons for the action he indicated he was going to have to take. It is noteworthy that during the spring of 1973 Dr. DuVal also informed another department head that it would be necessary for a change in departmental leadership. Dean DuVal testified that as soon as he was aware of the nature of the difficulty in the other department, he telephoned the other department head who was out of the country and gave him notice of the reasons for the required change in leadership.

The other change in the medical school was effected gracefully and without any public acrimony or embarrassment—at least there was no embarrassment until it became public knowledge due to the controversy over the Department of Surgery change. It is usual for such shifts to be accomplished smoothly, and it is likely that Dr. DuVal believed that such would be the case with the Department of Surgery. He was wrong. Dr. Peacock, backed by members of his department, decided to resist the change. He had two interviews with President Schaefer about the headship, interviews which neither persuaded Dr. Peacock to acquiesce nor Dr. Schaefer to withhold his support from Dr. DuVal. In August 1973 Dr. DuVal attended a surgery department faculty meeting. He neither convinced the surgeons of the appropriateness of his proposed course of action nor was he convinced by them to not take it. Later the department voted to re-affirm Dr. Peacock's leadership as department head. During all of this time Dr. DuVal did not make any public announcement of

the reasons for demanding Dr. Peacock's resignation. To do so would have unnecessarily embarrassed Dr. Peacock, if he had elected to resign quietly. Not doing so, however, caused the members of the department to conclude that there were no adequate reasons for the dismissal that was impending. It is possible that their understandable attitude helped to convince Dr. Peacock that he was not given the reasons for the headship action.

As the positions of the two sides hardened, the University administration undertook an increasingly thorough investigation of Dr. Peacock's performance as department head. As they did so new information about events which became a part of the accumulation we earlier referred to came to light. But by the time of the preliminary injunction hearings in Phoenix in March of this year, Dr. Peacock surely knew the nature of the case against him.

The University's statement of charges of June 17 constitutes an express notification of why the action was taken. We have earlier addressed ourselves to the adequacy of that notice when coupled with the occurrences at the hearing.

The University did not give Dr. Peacock a formal hearing prior to the actions of October 1973 when he first was dismissed and of May 1974 when he was reinstated and immediately suspended from performance of his duties as department head. When it became obvious to Dr. Peacock that he would be removed, and it must have before he was in fact removed, he could have gone to the Committee on Conciliation and thereafter he could have sought the help of this Committee. He did not do so. Nothing in the Faculty Manual would have prevented Dr. DuVal and President Schaefer from having given Dr. Peacock a formal hearing, if he wished one, before action was taken.

Instead of formal proceedings, the University administration used informal conferences with Dr. Peacock and the department, not for the purpose of fact-finding, but in a futile effort to persuade Dr. Peacock to bend to their will. These informal conferences were not an adequate substitute for a full hearing.

The administration did, however, as early as December 5, 1974 make a public announcement that it was ready to lay the facts before this Committee if Dr. Peacock invoked our jurisdiction. It was this offer that Judge Turrentine directed the University administration to keep open insofar as it applied to another issue concerning these parties. The offer initially, however, related only to the dismissal of Dr. Peacock from his headship.

We believe that the hearing which we have held was indeed a full hearing and a complete airing of the facts of the case. We wish it had come sooner, but it was held. The Judge's order to the administration to make this hearing available broke the Alphonse and Gaston act of the parties. There now has been a proper hearing.

Recommendation

The Committee therefore recommends that the suspension of Dr. Earl E. Peacock, Jr. from his duties as department head on or about May 8, 1974 now become a permanent dismissal from that position.

/s/ David L. Hetrick

David L. Hetrick, Chairman

/s/ Raymond Thompson

Raymond Thompson

/s/ Ray Davis

Ray Davis

THE UNIVERSITY OF ARIZONA
TUCSON, ARIZONA 85721

OFFICE OF THE PRESIDENT

September 27, 1974

Erle E. Peacock, Jr., M.D.
4525 North Hacienda del Sol
Tucson, Arizona 85718

Dear Dr. Peacock:

I have reviewed and considered the report submitted to me by the University Committee on Academic Privilege and Tenure regarding the headship of the Department of Surgery.

I have decided to accept and abide by the recommendations of the Committee.

Yours sincerely,

/s/ John P. Schaefer
John P. Schaefer

JPS:mm

cc: Dr. D. Hetrick
Dean Vanselow
Dr. DuVal

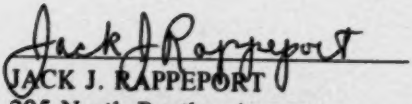
CERTIFICATE OF SERVICE

I, JACK J. RAPPEPORT, certify that the respondents' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT was served upon counsel of record by personal delivery of three (3) copies of said brief on June 5, 1975 to:

William Lee McLane, Esquire
McLane & McLane
2970 Valley Center
Phoenix, Arizona 85073

and by depositing three (3) such copies in the United States mail on June 4, 1975, postage prepaid, to:

Jeremy E. Butler, Esquire
Lewis & Roca
100 West Washington, 23rd Floor
Phoenix, Arizona 85003



JACK J. RAPPEPORT
205 North Bentley Avenue
Tucson, Arizona 85716
COUNSEL FOR RESPONDENTS

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1388

ERLE E. PEACOCK, JR.,

Petitioner,

v.

BOARD OF REGENTS OF THE UNIVERSITIES AND STATE COLLEGES OF ARIZONA; JACK R. WILLIAMS, WELDON P. SHOFSTALL; PAUL L. SINGER, SIDNEY S. WOODS, GORDON D. PARIS, JAMES E. DUNSEATH, MARGARET M. CHRISTY, KENNETH G. BENTSON, RALPH M. BILBY and RUDY E. CAMPBELL, each of the foregoing individually and in his or her capacity as a member of the Board Of Regents Of The Universities And State College Of Arizona; JOHN LENTZ and NORMAN SHARBER, each individually; JOHN P. SCHAEFER, individually and in his capacity as President of the University of Arizona; MERLIN K. DU VAL, individually and in his capacity as Vice President for Health Sciences and Acting Dean of the College of Medicine, University of Arizona; and DOUGLAS H. LINDSEY, individually and in his capacity as Acting Head of the Department of Surgery, College of Medicine, University of Arizona,

Respondents.

REPLY BRIEF IN RESPONSE TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

William Lee McLane
Nola McLane
2970 Valley Center
Phoenix, Arizona 85073
Attorneys for Petitioner

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[redacted]

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IN THE

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OCTOBER TERM, 1974

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Petitioner,

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Respondents.

REPLY BRIEF IN RESPONSE TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

ARGUMENT

Respondents' Brief In Opposition is silent as to three of the four Questions Presented in the Petition. They are Nos. 1, 3 and 4 dealing with the *First Amendment* issue, the liberty interest issue, and the elements of due process issue. Nor have Respondents confronted the merits of the fourth issue, whether a person with an interest in continued employment or a particular status protected by the *Fourteenth Amendment* can be deprived of that protected interest by suspension therefrom without prior notice or hearing of any kind.

The first reason assigned by Respondents as a ground for denying the writ is the simple conclusionary statement that the decision below does not conflict with any decision of the Supreme Court of the United States.

The second reason Respondents assign as a ground for denying the writ is their claim that the decision below does not conflict with *Hostrop v. Board of Junior College District No. 515*, 471 F.2d 488, 494-495 (7th Cir. 1972). That decision held that Dr. Hostrop, a college administrator who asserted protected interests entitled to due process procedural safeguards, was entitled to a hearing *before* being deprived of those interests, and that it was only in determining the *form* of that *prior* hearing that the interests of the state were balanced against the interests of the individual. Compare that holding with the decision below in which the Ninth Circuit held that in determining *whether* a person is entitled to a pre-deprivation due process hearing before his property interests are taken, his interests in receiving the hearing provided for in the *Fourteenth Amendment* must be balanced against the state's interests in denying him such a hearing. In the one case, *Hostrop, supra*, the right to the pre-deprivation hearing is affirmed and

in the second case, the decision below, the right to the pre-deprivation hearing depends on whether the interests of the state weigh heavier than the interests of the individual, a weighing game which most persons are going to lose.

Respondents attempt to distinguish *Hostrop, supra*, on two grounds.

The first is the argument that in *Hostrop, supra*, the complaint was dismissed by the trial court without a hearing so there was no basis upon which the trial court could balance the opposing interests whereas here the trial court heard evidence before it balanced such interests. But this merely highlights the fact that the trial court herein applied an incorrect rule when it balanced the interests of a state against the interests of an individual in determining *whether* a person is entitled to a pre-deprivation hearing rather than balancing those interests to determine the *form* of that pre-deprivation hearing. Furthermore, the distinction ignores the holding of *Hostrop, supra*, which means that had the trial court therein taken evidence and balanced the competing interests, it would have been compelled to do so only with respect to determining the form of the pre-deprivation hearing but it could not have so balanced interests to determine whether or not Dr. Hostrop was entitled to a pre-deprivation hearing.

Respondents' second asserted distinction is that in *Hostrop, supra*, the Seventh Circuit ordered a pre-termination hearing whereas here the trial court reinstated Dr. Peacock and granted him a pre-termination hearing, the report of which Respondents attached as Appendix B. This second distinction ignores the fact that Dr. Peacock was suspended, without notice and hearing, from his position as Head of the Department of Surgery within two hours after his reinstatement, and erroneously implies that one of the issues raised here was

whether Dr. Peacock could be deprived of a protected interest without a pre-termination or pre-dismissal hearing whereas Question Presented No. 2 and the thrust of the Petition with respect thereto is "whether a person with an interest in continued employment or a particular status protected by the *Fourteenth Amendment* can be deprived of that protected interest by *suspension* therefrom without prior notice or hearing of any kind." It is no answer to the question of whether a *Fourteenth Amendment* protected interest can be taken by suspension therefrom without notice or hearing to say that after it was so taken, the offending state afforded that party a post suspension hearing which the state labels a pre-termination hearing.

It is clear therefore that the real purpose of Responsents' second distinction was as a vehicle to get before the Court a written report of a unilateral post suspension hearing conducted without participation by Dr. Peacock or his counsel at a time when Dr. Peacock had on appeal the question of whether a post suspension hearing met the requirements of the *Fourteenth Amendment*. The report itself, at pages A-15 and A-16 of Respondents' Opposition, states that the Committee had been notified three times that Dr. Peacock and his counsel would not participate in such a post suspension hearing until the federal courts finally ruled on the question of whether a person's *Fourteenth Amendment* protected interests could be taken without a pre-suspension hearing and the *Fourteenth Amendment* satisfied by a post-suspension hearing. For Respondents to attach to their opposition in the Supreme Court of the United States the said written report of a hearing conducted while this appeal was pending, whose legality was being challenged in this appeal, and in which Dr. Peacock and his counsel declined to participate pending the determination of this appeal, is an eloquent testimonial to the poverty of Respondents' opposition. Furthermore, the hearings upon which Respondents rely did not even

deal with the question of Dr. Peacock's suspension on May 7, 1974. Rather the notice of charges by Respondent expressly referred to Dr. Peacock's removal as Head "on October 25, 1973." Also, the Court is invited to compare the element of procedural due process requiring specific charges with the two charges that "the clinical department heads at the College of Medicine lost *trust and confidence* in Dr. Erle E. Peacock, Jr. as a department head and could not effectively work with him for the *good of the University of Arizona* College of Medicine", and that "in his dealings with people within the College of Medicine and outside of the College of Medicine in the community at large [he] conducted the affairs of the Department of Surgery in an *unprofessional manner* inimical to the *best interests of the College of Medicine*." (See Appendix A herein).

Finally, an adequate remedy at law in the form of money damages is no defense to injunctive relief and reinstatement where one has been denied a constitutional right. A district court has no discretion to deny relief by preliminary injunction to a person who clearly establishes that he or she has been denied a constitutional right. *Henry v. Greenville Airport Comm'n*, 284 F.2d 631, 634 (4th Cir. 1960); *Bravo v. Board of Education*, 345 F. Supp. 155, 159 (N.D. Ill. 1972). That is, the deprivation of a constitutional right establishes automatically immediate and irreparable harm. *Brass v. Hoberman*, 295 F. Supp. 358 (S.D. N.Y. 1968); see *Board of Supervisors of Louisiana State University v. Wilson*, 340 U.S. 909, *aff'g*, D.C., 92 F. Supp. 986. "Extensive research has revealed no case in which it is declared that a judge has judicial discretion by denial of an injunction to continue the deprivation of basic human [civil] rights." *Clemons v. Board of Education*, 228 F.2d 853, 857 (6th Cir. 1956).

CONCLUSION

A writ of certiorari should issue.

Respectfully submitted,

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Attorneys for Petitioner

[APPENDIX FOLLOWS]

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APPENDIX A

Notice of Hearing of the Committee On Academic Privilege And Tenure, July 3, 1974..... A-1

APPENDIX A

COMMITTEE ON ACADEMIC PRIVILEGE AND TENURE

The University of Arizona

July 3, 1974

NOTICE OF HEARING

A hearing will be convened at 1:00 pm on Wednesday July 3, 1974 in the Moot Court Room, ground floor, College of Law in response to the request dated May 9, 1974 by President Schaefer regarding the removal of Dr. Erle Peacock as Head of the Department of Surgery. With the consent of the counsel for the appellant (the University administration), this hearing will be open to the public.

Rules of procedure are set forth in the Faculty Manual, Thirteenth Edition, Bylaw 12b (ii), pages 70-71, especially Items (a) through (i), except that by agreement among the parties in the pre-hearing conference of June 7, 1974, the requirement for twenty days' notice is waived.

According to documents filed on June 17, 1974, by Messrs. Jones and Rappeport, the University of Arizona administration charges:

1) that Dr. Erle E. Peacock, Jr. was removed as Head of the Department of Surgery on October 25, 1973 because he acted unilaterally and independently as a clinical department head and without regard for the impact of the results of his actions on his colleague clinical department heads and on the institution

(University of Arizona College of Medicine) as a whole. As a result of the foregoing, the clinical department heads at the College of Medicine University of Arizona lost trust and confidence in Dr. Erle E. Peacock, Jr. as a department head and could not effectively work with him for the good of the University of Arizona College of Medicine.

2) that Dr. Erle E. Peacock, Jr. in his dealings with people within the College of Medicine and outside of the College of Medicine in the community at large conducted the affairs of the Department of Surgery in an unprofessional manner inimical to the best interests of the College of Medicine.

/s/ David L. Hetrick
David L. Hetrick
Chairman

cc:

Mr. Jeremy E. Butler	Dr. Erle Peacock
Mr. Ray Davis	Mr. Jack Rappeport
Dr. Merlin DuVal	Dr. John Schaefer
Mr. William Jones	Dr. Raymond Thompson
Mr. William McLane	Dr. Willard Van Slyck
Dr. Donald Myers	Dr. Albert Weaver